Having a say

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Indigenous Peoples, International Law
and Free, Prior and Informed Consent

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In February 2008, I attended a guest seminar by Asbjørn Eide at Tilburg University. I had just returned from a long stay at Uppsala University, Sweden, where I took a number of Master courses in International Law, including some lectures on the Saami and their rights. I also had the chance to visit a part of Sápmi in the North of Sweden near the mining town of Kiruna, where I enjoyed both the Aurora Borealis and some of the strongest coffee I ever tasted.

The UN Declaration on the Rights of Indigenous Peoples had just been adopted and Professor Eide explained some of its core principles in an inspiring lecture. I asked him about the interpretation of "free, prior and informed consent," of course unaware that this question would keep me occupied for six years to come.

That question resulted in a Master thesis, admittance to the Tilburg University Research Master program, a research proposal, and eventually a PhD position at the department of European and International Public Law and the Center for Transboundary Legal Development at Tilburg University.

It has been a great privilege to receive the chance to write, teach, and learn so much about the fascinating topics of indigenous peoples, multiculturalism and human rights. In contemporary conflicts over cultural recognition, land rights, and the earth's remaining resources – caused by the ongoing process of economic globalization – the interests of all those involved need to be balanced carefully. The cover image of the Brokopondo Reservoir in Suriname is symbolic for the diversity of interests that may be at stake. In this context, international human rights law is challenged to contribute to more equal and inclusive societies.

Fortunately, writing a PhD is not always a solitary task, and many people helped me to conclude this project successfully. I would like to seize this opportunity to thank some of them.

First and foremost, I would like to thank my supervisors Willem van Genugten and Anna Meijknecht. Willem, thank you for all the guidance and opportunities you have provided me with over the years. You assisted me with all the difficult choices I had to make in my academic career, and I strongly feel they were all the right ones. Your advice has been priceless. Anna, our countless meetings have been invaluable and I enjoyed every one of them. I will never forget our research and teaching visits to Suriname and Ireland. Thank you for having so much confidence in me and always helping me out.

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Bas Rombouts
Tilburg, May 2014

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACsHPR	African Commission on Human and Peoples' Rights
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
EIDHR	European Instrument for Development and Human Rights
EIR	Extractive Industries Review
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
ESIA	Environmental and Social Impact Assessment
FAO	Food and Agriculture Organization
FCPF	Forest Carbon Partnership Facility
FPIC	Free, Prior and Informed Consent
FSC	Forest Stewardship Council
HRC	United Nations Human Rights Committee
IADB	Inter-American Development Bank
IACtHR	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
ICC	Indian Claims Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO	International Labour Organisation
MTCC	Malaysian Timber Certification Council
MTCS	Malaysian Timber Certification System
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
PEFC	Programme for the Endorsement of Forest Certification
RSB	Roundtable on Sustainable Biomaterials
RSPO	Roundtable on Sustainable Palm Oil
RTRS	Roundtable on Responsible Soy
SFM	Sustainable Forest Management

TPAC	Dutch Timber Procurement Assessment Committee
UN-REDD	United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNPFII	United Nations Permanent Forum on Indigenous Issues
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
VIDS	Vereniging Inheemse Dorpshoofden Suriname
VSG	Vereniging Saramakaanse Gezagsdragers
WGIP	Working Group on Indigenous Populations

I. INTRODUCTION

One morning in 1997, somewhere in the vicinity of Kajapaati village Suriname, a group of Saramaka Maroon children were playing in the forest when they discovered Chinese loggers – escorted by Surinamese soldiers – felling trees and constructing roads, buildings, and further infrastructure needed for large-scale logging operations.[1] The effects on the community's traditional hunting grounds were devastating. One of the Saramaka eyewitnesses declared:

> The soldiers told me: "Leave the Chinese, go hunting here (in an area where the Chinese have finished cutting already). But don't let the Chinese see you." Well, I went there: there was destruction everywhere; the forest was destroyed. In Paramaribo people do not know what the Chinese are doing. Should not someone control the logging-activities of foreign investors? The Chinese cut hundreds of trees, dragged them to a place and piled them up there. They abandoned them in the forest because they did not need them anymore. For us, people from the interior, it is terrible to see cedar trees cut down that are so important for us. And all this destruction made the animals flee away also.[2]

Dr. Richard Price, a well-known anthropologist and leading academic expert on the Saramaka people, declared that without immediate protective measures, ethnocide, which in his opinion would mean the destruction of one of the most creative and vibrant cultures in the entire African Diaspora, would be the most likely outcome. Dr. Price concluded that: "By unilateral fiat, and through the granting of logging and mining concessions to Chinese companies, the postcolonial government of Suriname is currently attempting to expunge some of the most sacred and venerable rights of Saramakas. In this respect, the destruction of the Saramakas' forest would mean the end of Saramaka culture."[3] Head Captain and Fiscali of the Saramaka People, Wazen Eduards testified:

> The forest is like our market place; it is where we get our medicines, our medicinal plants. It is where we hunt to have meat

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[1] *Cf.* Price R, *Rainforest Warriors, Human Rights on Trial* (University of Pennsylvania Press, 2011), p. 104 and 254: Different accounts circulate of the Chinese arrival.

[2] Forest Peoples Programme**,** *Inter-American Commission on Human Rights requests that Suriname suspend logging and mining concessions in Saramaka Maroon territory*, Press Release, 20th August 2002, www.forestpeoples.org.

[3] Ibid. Also see: Price R, *Rainforest Warriors, Human Rights on Trial* (University of Pennsylvania Press, 2011), p. 104. "If they interfered with Chinese logging operations, they were told, they would be arrested and imprisoned."

> to eat. The forest is truly our entire life. When our ancestors fled into the forest they did not carry anything with them. They learned how to live, what plants to eat, how to deal with subsistence needs once they got to the forest. It is our whole life.[4]

In November 2007, the Inter-American Court of Human Rights ruled against the State of Suriname in asserting that it had violated the property rights of the Saramaka forest people by granting logging concessions to third parties without the consent of the Saramakas.[5] Large-scale extractive industry projects on indigenous peoples' territories, often with state approval but without the consent or participation of the indigenous population residing there, are unfortunately common and are amongst the main concerns for these people.[6]

I.1 Indigenous Peoples and Free, Prior and Informed Consent

> Immense energy has been invested in promulgation of the principle that activities affecting the lands, resources, and environments of indigenous peoples must be subject to full prior informed consent or consultation. Indigenous groups have insisted that consent is required; many States have insisted that consultations are all that is needed. The differences on the ground may often be less marked, given asymmetries of power and violations of the rule of law that often in fact occur. Nonetheless, this has been an important dimension of juridification of indigenous issues, and has provided significant leverage for them in national court proceedings, particularly in Latin America.[7]

While official statistics diverge, indigenous peoples make up approximately 6% of the world's population (some 370 million individuals) and encompass around 5000 distinct peoples in over 70 countries. They represent about 80% of the world's cultural diversity and their environments comprise approximately 80% of

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[4] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 82. Testimony of Head Captain and Fiscali Wazen Eduards during the public hearing at the Court held on May 9 and 10, 2007 (transcription of public hearing, pp. 3-4).

[5] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007).

[6] Numerous examples are provided throughout this study. See especially the case law discussed in Part V and the reports, decisions, and documents of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on Economic Social and Cultural Rights referred to in Part IV.

[7] Kingsbury B, 'Indigenous Peoples', Max Planck Encyclopedia of Public International Law, www.mpepil.org, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2012, paragraph 38.

the globe's biological diversity.[8] Indigenous peoples suffer disproportionately from poverty.

Pressing problems exist worldwide in relation to conflicts over lands and resources and the implications hereof on indigenous communities are profound. Due to the ongoing process of (economic) globalization, transnational corporations (TNCs) can more easily gain access to natural resources in developing regions with indigenous populations. Furthermore, the present economic situation leads to further escalation of the worldwide battle for natural resources, in which indigenous peoples often suffer first and worst.

More fundamentally, in some cases the very survival, both cultural and physical, of indigenous communities as distinct cultural collectives is at stake. Especially small, sometimes (partially) isolated communities are vulnerable and are amongst the first to experience the negative effects of these activities. Large-scale projects, like mining, logging, or the building of hydroelectric dams can severely affect indigenous peoples' livelihoods, ancestral territories, and their culture. [9] Considering the major impact these projects have on indigenous communities, often transforming their entire way of life, it seems reasonable that decisions about these projects should not be taken without the people concerned having a say in them.

For this reason, *free, prior and informed consent* (FPIC) is devised as a tool in international law to give indigenous peoples the power to participate in, and influence the outcome of, such decisions. At first glance, the idea seems sufficiently clear but deeper investigation reveals that this notion is not as straightforward and easily applicable as it looks. Conflicting interpretations and lack of clarity as to its scope and content hamper effective implementation of this relatively new standard. The goal of this study is to reveal and analyze the context and content of FPIC in order to suggest directions to improve its effectiveness and promote its implementation. Therefore the question that is central to this study reads:

How is the concept of "free, prior and informed consent" presently understood in the context of indigenous peoples' rights - under international law - to self-determination, land, resources, and participation and under which conditions could its implementation succeed in practice?

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[8] *See,* Official Website of the United Nations Permanent Forum on Indigenous Issues *(UNPFII), http://www.un.org/esa/socdev/unpfii/, visited 26 December 2013.*

[9] The effects can be devastating. Rainforest, for example, does not regenerate back to its original level of biodiversity after logging activities have taken place; it is substituted by so-called secondary forestation. Furthermore, open-pit mining projects often include the use of dangerous chemicals that pollute the soil and waterways, leading to severe health issues in certain indigenous communities. The building of hydroelectric dams has displaced tens of thousands of indigenous people from their traditional lands.

I.2 Indigenous Peoples, International Law, and Human Rights

Public international law in its pure post-Westphalian form is created by sovereign nation states. In its predominant perception since the end of the Second World War, human rights law has been concerned with protecting the individual. The primary concern with the state and the individual in international law is challenged by the emerging legal framework on the protection of intermediate and often vulnerable groups. This development has been a rather slow one opposed by many states on the basis of arguments related to inter-group conflict, secession, and controversy over the collective nature of the claimed standards.[10] Nevertheless, a substantial body of *generic* and *targeted* legal norms pertaining to the protection of certain ethno-cultural groups has developed.[11]

Generic protection of these groups in international law centers around Article 27 of the International Covenant on Civil and Political Rights, which protects the right to culture.[12] Targeted norms focus on specific types of groups within the broader framework of minority protection, e.g. national minorities, immigrants, and indigenous peoples. [13]

The last four decades have witnessed the emergence of a considerable body of legal and quasi-legal norms pertaining specifically to this latter group. Indigenous peoples have sought international legal protection since states are often the violators of their asserted rights. Although there is no single official

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[10] On the debate over collective or cultural rights, in general *See* Kymlicka W, *Multicultural Citizenship* (OUP, Oxford 1995). *Also See* Kukathas C, 'Are There Any Cultural Rights?', Political Theory, Vol. 20, No. 1, February 1992. *Also See* Roth H I, 'Collective Rights, Justifications and Problems,' Centre for Multiethnic Research, Uppsala University, 1999. For a more communitarian perspective *See* Taylor C, 'The Politics of Recognition' in Amy Gutmann, *Multiculturalism, Examining the Politics of Recognition* (Princeton University Press, Princeton, 1995) 25 – 73. *Also see* Dyke V V, 'The Individual, the State, and Ethnic Communities in Political Theory', World Politics, Vol. 29, No. 3, 1977. For a comprehensive theoretical exposition see: Galenkamp M, *Individualism versus Collectivism: the Concept of Collective Rights* (Dissertation, Erasmus Universiteit, Faculteit der Wijsbegeerte, Rotterdam,1993)

[11] See e.g. W.J.M. van Genugten et. al, *The United Nations of the Future, Globalisation with a Human Face* (KIT publishers, 2006).

[12] Noteworthy, Article 27 does not confer genuine collective rights to groups, but refers to their individual members. Nevertheless, Article 27 has provided the basis for a series of cases on the legal protection of (members belonging to) minorities and the Human Rights Committee has expressed its willingness to accept collectively submitted communications. See primarily: *Lubicon Lake Band vs Canada*, Case 16/1984, view of 26 March 1990. UN Doc. Supp. No. 40 (A/45/40). *Sandra Lovelace vs Canada*, Case 24/1977, UN Doc. A/36/40, 29 December 1977. *Apirana et. al. vs New Zealand*, Case 547/1993, view of 20 October 2000. UN Doc. CCPR/C/70/D/547/1993 (2000). Also see: *Ilmari Länsman et al. v. Finland*, HRC, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).
Jouni Länsman et al. v. Finland, HRC, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996).

[13] Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007).

definition in international law, relevant characteristics of indigenous peoples are that they are culturally distinct from the majority population, they have retained some or all of their own governmental and cultural structures (and are willing to preserve those), and often have a special, spiritual relation with their lands. Well-known working definitions focus on objective criteria and on subjective elements, whereas self-identification as indigenous is considered a fundamental criterion.[14]

The first international legal document dealing specifically with indigenous peoples is the International Labour Organisation's Convention No. 107 of 1957 (ILO 107),[15] which was replaced in 1989 by ILO Convention No. 169 (ILO 169).[16] Even though ILO 107 is officially still in force, it was replaced because it focused not so much on the rights of indigenous peoples in the light of preserving their culture, but had a more assimilative approach, aiming at progressive integration into the majority culture as the appropriate solution to combat discrimination and poverty.[17] Replacing ILO 107 with ILO 169 reflected a broader shift in legal and political thinking concerning indigenous peoples.[18] The emphasis on integration and non-discrimination slowly shifted towards less patronizing ideas of self-determination, equal participation, and

---

[14] *See*, E/CN.4/Sub.2/1983/21/Add.8, José R. Martínez Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8 page 50 at 379 and page 5 at 21 and 22. *Also see*, ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, (Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, *entry into force* 5 September 1991) article 1.

[15]ILO Convention No. 107, (1957, Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, entry into force: 02-06-1959).

[16] ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, (Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entry into force 5 September 1991).

[17] Paragraph 46 of the 1986 report of the Meeting of Experts described the need for replacement quite explicitly: "The integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. In 1956 and 1957 it was felt that integration into the dominant national society offered the best chance for these groups to be part of the development process of the countries in which they live. This had, however, resulted in a number of undesirable consequences. It had become a destructive concept, in part at least because of the way it was understood by governments. In practice it had become a concept which meant the extinction of ways of life which are different from that of the dominant society. (...) policies of pluralism, self-sufficiency, self-management and ethno-development appeared to be those which would give indigenous populations the best possibilities and means of participating directly in the formulation and implementation of official policies." ILO Conventions are legally binding. Up untill now however, ILO Convention 169 has only been ratified by 21 States.

[18]The provisions and principles of ILO Convention 169 were substantially influenced by the Martínez Cobo Study, for the final report, *see* Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8.*

cultural integrity.[19] The political climate changed in the 1970, partly under the influence of the 1966 Human Rights Covenants,[20] and partly because indigenous peoples themselves found better ways for making their voices heard in the international arena.[21]

Thus, instead of emphasizing non-discrimination and integration, the focus shifted towards self-determination and cultural integrity and towards accepting that indigenous peoples have their own cultures distinct from the larger political order and are often willing to preserve those. The claim to self-determination entails the belief that the right of indigenous peoples to practice their culture and traditions freely in accordance with their own institutional structures and customs is invaluable in protecting them, and that in order to achieve this, indigenous peoples should be able to fully participate in the relevant decision-making processes.[22]

Indigenous peoples, as distinct peoples, are to be self-determining actors or subjects instead of merely object of protection.[23] This change in perception can be described as the move towards "accommodation" and away from "integration."[24]

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[19]Anaya S J, *Indigenous Peoples in International Law* (Second Edition, Oxford University Press, 2004).

[20]International Covenant on Civil and Political Rights (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976) & International Covenant on Economic, Social and Cultural Rights (G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976). *See* A. Eide, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century' (2006) Netherlands Yearbook of International Law, 163.

[21]James Anaya, the second UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, distinguished two significant developments after the end of the Cold War and the decolonisation period. Related to the decline of the Soviet authoritarian system, there arose a renewed world-wide faith in non-authoritarian democratic institutions. Moreover, the idea of subsidiarity gained ground; the conviction that decisions can often best be made at the most local level (bottom-up instead of top-down approaches). The second development Anaya mentions can be characterised as the embrace of cultural pluralism, brought about by the fading classic notion of the culturally or ethnically homogenous nation-state. *See* Anaya S J, *Indigenous Peoples in International Law* (Second Edition, Oxford University Press, 2004).

[22]In other words; where ILO Convention No. 107 was still 'about them, without them' the newer instruments are more a result of a cooperative effort, in which indigenous representatives had a say about what kind of measures, rights or policies they need.

[23] As will be examined in-depth later on, this concept of indigenous self-determination does not, in contemporary international law, focus on secession and independent statehood (external self-determination), but on forms of autonomy or self-government and effective participation in the larger political order (a distinct form of internal self-determination) *See* Cassese A, *Self-Determination of Peoples, a Legal Reappraisal* (Cambridge University Press, 1995, reprinted in 1996). Also see: Summers, James, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, (Martinus Nijhoff Publishers, Leiden/Boston, 2007).

[24] Kymlicka W, 'The Internationalization of Minority Rights', International Journal of Constitutional Law, 6(3/4), 2008. Kymlicka argues that potential self-governing groups, like

Eventually, this shift in thinking would pave the way for the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in September 2007.[25] While ILO 169 remains the only legally binding instrument (together with ILO 107, which is still in force for some countries), the UNDRIP is the most widely supported document dealing specifically with indigenous peoples and some of its provisions can be perceived as reflective of customary international law.[26]

The Declaration's articles and preamble paragraphs reflect the main areas of concern for indigenous peoples and seek to protect a substantial number of collective rights in addition to individual rights.[27] Recognition of such collective rights is perceived as essential to guarantee the continuing cultural survival of indigenous peoples as distinct collectives.[28] It is increasingly acknowledged that a number of issues are difficult to approach under a solely individual human rights regime since they specifically pertain to indigenous peoples as collectives.

UNDRIP: Key and Controversial Issues

Although the Declaration was adopted with an overwhelming majority, some controversial issues remained. The most controversial ones all have to do with the topic of this study: the right to self-determination, rights to lands and resources, and rights to consent to political or other decisions that may affect indigenous peoples.[29]

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indigenous peoples, should get similar tools of nation-building to those of states. *See* Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007). Integration in the sense used here refers to full integration into majority culture, which is quite different from "fair inclusion" into a society.

[25] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, adopted by the General Assembly on Thursday September 13, by a vote of 144 in favour, 4 against and 11 abstentions. The final text was the result of a process of nearly 25 years of drafting and discussion.

[26] Eide A, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century', Netherlands Yearbook of International Law, 163, 2006, 207.

[27] These rights are to be read in conjunction with the broader framework of human rights protection, *see* Preamble and *inter alia* article 46(2) of the United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295*,).

[28] The collective provisions in the Declaration flow from some of the most pressing issues for indigenous peoples: threats to their lands, conflicts over resources, exclusion from decision-making, and the lack of self-determined development. *See e.g.* Genugten W J M van, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems', 104 Am. J. Int'l L, 2010 & Wiessner S, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples', 41 Vanderbilt Journal of Transnational Law, 2008.

[29] See UN Sub-Commission on the Promotion and Protection of Human Rights, Indigenous peoples' permanent sovereignty over natural resources: Working paper by Erica-Irene A. Daes, former Chairperson-Rapporteur of the Working Group on Indigenous Populations, 30 July, 2002. E/CN.4/Sub.2/2002/23. Also see: Wiessner S, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples', 41 Vanderbilt Journal of Transnational Law, 2008.

After a quarter of a century of careful drafting, the adoption of the Declaration marked a "milestone of re-empowerment" for indigenous peoples.[30] A unique feature of the UNDRIP is that it was drafted in consultation with indigenous peoples worldwide, a feature that reflects contemporary perspectives on how to respect indigenous rights and one that will be a central theme throughout this study. The UNDRIP is therefore a result of compromises between state and indigenous views, rather than the usual state developed international document. UNDRIP contains different rights and principles that are particularly important for indigenous peoples and sets out minimum standards for their protection. It contains rights to freedom, equality, life, and integrity, but also rights to preserve and vitalize their cultures. Furthermore, the UNDRIP has provisions on education, language, media, labour rights, traditional knowledge, and cultural heritage. Most importantly, UNDRIP contains numerous provisions that deal with indigenous peoples' rights to their lands and resources. These provisions have to be seen in light of the right to self-determination and the different principles and rights on effective participation. These rights and principles are devised to operationalize self-determination and to make sure that indigenous peoples are adequately involved in matters concerning their lands, resources, and further interests. These rights – self-determination, lands, resources, and participation – form the most controversial part of the UNDRIP.

While it was adopted with an overwhelming majority of votes, four large common law states, the United States, Canada, New Zealand, and Australia – all states with large indigenous populations – voted against it. Their concerns had to do with the nature of the right to self-determination, with the possible implications of granting indigenous peoples far-reaching land and resource rights (including rights to restitution and compensation), and the right to free prior and informed consent prior to the approval of any project that may affect their lands or territories (Article 32). Seen together with the general framework of participation rights, enshrined in Article 18 and 19 of the UNDRIP, their implementation may have profound redistributive economic consequences. Nevertheless, these rights could also constitute an extremely important last line of defense for indigenous communities.[31] Fortunately, all four opponents revised their position and later on endorsed the UNDRIP. Nevertheless, the issues mentioned were never really resolved.[32]

The UNDRIP is the most important part of international law for the purposes of this study and constitutes the key framework of reference. In order to come up with a proper answer to the research question it is vital to examine

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[30] Wiessner S, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples', 41 Vanderbilt Journal of Transnational Law, 2008, pp. 1141-1142.

[31] Eide A, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century', Netherlands Yearbook of International Law, 163, 2006.

[32] For instance, the questions was posed whether Article 19 conferred upon indigenous peoples a veto right over national legislation. Furthermore, it was claimed more generally that the provisions on lands and resources were unworkable and unacceptable.

FPIC processes in light of the right to self-determination and rights to lands and resources, since these concepts are very much intertwined.

The Human Rights Framework

Indigenous claims are often framed in the language of human rights but the human rights revolution can be seen as a double-edged sword because it opens up political space for ethno-cultural groups to contest inherited hierarchies, while it also demands groups to advance their claims in the *specific language* of human rights, civil rights liberalism, and democratic constitutionalism.[33] Consequently - and as will be illustrated in this study on multiple occasions - this means that some international legal concepts require fundamental rethinking and progressive interpretation.

According to James Anaya, claims framed in the language of human rights are likely to be more successful than claims that originate from a state-centered strain of argument.[34] The human rights movement may also be a more effective vehicle for creating awareness and sympathy about the situation of indigenous peoples worldwide.[35] Human rights could be seen as the articulation of rightful claims made on behalf of those who require the status quo to be contested in order to redress injustices.[36] They have the ability to generate powerful political and moral conviction, but as the indigenous rights movement clearly shows claiming real recognition of rights is a long, and maybe even endless, struggle.[37]

International human rights law provides a set of standards against which state behavior is to be assessed. It poses limitations upon state sovereignty insofar as it tells us that the state's treatment of its citizens (including indigenous peoples and other minorities) is not only an internal matter but also a legitimate matter of international concern.[38] Rights matter because they speed up and channel the process of worldwide diffusion or distribution of norms related to indigenous

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[33] Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007), pp. 92-93: *Cf.* Tully J, *Strange Multiplicity, Constitutionalism in an Age of Diversit* (Cambridge University Press, 1995), p. 108: "Understanding a general concept consists in being able to give reasons why it should or should not be used in any particular case by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents and drawing attention to intermediate cases so that one can pass easily from familiar cases to the unfamiliar and see the relation between them."

[34] Anaya S J, 'Superpower Attitudes Toward Indigenous Peoples and Group Rights', Am. Soc'y Int'l L. Proc. 93, 1999, p. 252.

[35] *Cf.* Rorty R, '*Human Rights, Rationality, and Sentimentality*', 1993.

[36] Dembour M B, 'What Are Human Rights? Four Schools of Thought', Hum. Rts. Q. 32, 2010.

[37] *Cf.* Douzinas, C. (2000). *The end of human rights: Critical legal thought at the turn of the century*, Hart Publishing, p. 342.

[38] Bankes N, 'International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples', 47, Alberta Law Review, 2010, pp. 494 – 495.

peoples. Consequently, the rapid diffusion of FPIC norms in particular is promoted by its legal character.

Human rights reflect societal struggles for recognition. This is very apparent in the indigenous discourse, and the rights asserted in UNDRIP refer to a number of pressing societal problems. This implies that these struggles are far from over once a right has been asserted or recognized: after the standard setting has been conducted the difficult process of implementation just begins.

The Central Place of Participation Rights

Participation rights and standards form an important part of the contemporary system of indigenous peoples protection. As will be examined in detail in this study, self-determination and derivative rights to control lands and resources require well-developed participatory approaches. The aim of these participation rights is to create a more equal situation in decision-making processes that affect indigenous groups. Equality for vulnerable groups like indigenous peoples or minorities vis-à-vis the majority culture should be attained not only in law but also in fact.

As the Permanent Court of International Justice concluded in the Minority Schools of Albania case: "Equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. There would thus be no true equality unless minority groups were enabled to sustain those characteristics that defined them as minorities."[39] In order for participation to be effective and based on a situation of true equality, one should always take into account the specific and often vulnerable situation in which many indigenous peoples find themselves.

In line with these remarks on true equality as a necessary requirement for effective participation, the UN Human Rights Committee has similarly observed in the Apirana Case, recalling its general comment on Article 27 of the ICCPR, that: "Especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them."[40] Where Article 27 (explained as the right to enjoy one's culture) was traditionally understood as including only negative rights of non-interference,[41] the Committee emphasizes

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[39] Permanent Court of International Justice, *Minority Schools in Albania Case*, Ser. A/B No. 64, 1935. In: Meijkecht A, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia – Hart, Antwerpen – Groningen – Oxford, 2001), p. 101.

[40] HRC, Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000). In: Moucheboeuf A, *Minority Rights Jurisprudence* (Council of Europe Publishing, 2006), pp. 262-263.

[41] Will Kymlicka W, 'Theorizing Indigenous Rights', University of Toronto Law Journal 49, 1999, p. 284.

the importance of positive legal measures.[42] An active duty for the state to consult indigenous peoples is similarly observed in two cases before the Committee concerning violations of Saami cultural rights under Article 27.[43] In these cases, the duty to consult arose by virtue of indigenous peoples' interest in cultural integrity and rights of use for certain purposes.[44] Parallel to the Apirana Case, the Committee notesthat measures must be taken to ensure the effective participation of members of minority communities in decisions which affect them.[45]

The Committee expands the protection under Article 27 towards a more positive obligation for the state to ensure effective participation. As will be argued in subsequent paragraphs, this is in line with an interpretation of internal self-determination for indigenous peoples as a participatory, ongoing, and relational concept.[46] As Will Kymlicka has observed, there is a need for a conception of indigenous rights that accords them substantive rights to autonomy and self-determination, but which works within the framework of larger states.[47] What is needed, according to Kymlicka, is a middle ground entailing a positive interpretation of Article 27 and an interpretation of self-determination that does not imply a right to secede and form a new independent state; a form of internal self-determination and positive cultural protection through equal participatory processes.[48]

In light of the framework that the UNDRIP provides, FPIC processes may be seen as an important tool to accomplish more equal and inclusive decision-making.

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[42] Also see: Office of the High Commissioner for Human Rights, General Comment No. 23, the Rights of Minorities, Article 27, CCPR/C/21/Rev.1/Add.5(1994). In paragraph 6.1 the Committee stresses that although Article 27 is expressed in negative terms, it nevertheless entails positive obligations.

[43] HRC, Länsman et al. v. Finland, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994). & HRC, Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996).

[44] Anaya S J, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of what Rights Indigenous Peoples have in Lands and Resources', Arizona Journal of International and Comparative Law 22, 2005, p. 12.

[45] Moucheboeuf A, *Minority Rights Jurisprudence* (Council of Europe Publishing, 2006), p. 262.

[46] Although Self-Determination is not a right cognizable under the Optional Protocol. See: Office of the High Commissioner for Human Rights, General Comment No. 23, the Rights of Minorities, Article 27, CCPR/C/21/Rev.1/Add.5(1994), paragraph 3.1.

[47] Will Kymlicka W, 'Theorizing Indigenous Rights', University of Toronto Law Journal 49, 1999, p. 285.

[48] *Cf.* Kymlicka W, 'Theorizing Indigenous Rights', University of Toronto Law Journal 49, 1999. In principles, indigenous peoples do not possess rights to secession although it can be argued that when certain human rights violations by the state are so pervasive, structural, and serious, indigenous peoples may have such a right as an *ultimum remedium*. This study discusses situations in which indigenous peoples do remain within the framework of the state.

I.3 A Short Introduction to the Legal Status of FPIC

> As a crucial dimension of the right of self-determination, the right of indigenous peoples to free, prior and informed consent is also relevant to a wide range of circumstances in addition to those referred to in the Declaration. Such consent is vital for the full realization of the rights of indigenous peoples and must be interpreted and understood in accordance with contemporary international human rights law, and recognized as a legally binding treaty obligation where States have concluded treaties, agreements and other constructive arrangements with indigenous peoples.[49]

Free, prior and informed consent is rapidly developing into one of the most important legal safeguards indigenous peoples have at their disposal. Since it is still in a phase of dynamic development, full consensus on its application and interpretation is absent, and both its elements and its place in the broader legal framework concerning indigenous rights are underexposed.

While this study will examine the principles, procedures, platforms, and practices connected with FPIC in detail, it seems appropriate to already provide the reader with a compressed legal commentary on the current status of FPIC. This concise overview might be useful for a better understanding of the different parts and paragraphs that follow. After this short introduction, a paragraph on the research approach and the different sub-questions that inform the main research goal will conclude this introductory part.

FPIC: Current Legal Status

FPIC is becoming a key principle for the protection of indigenous peoples. Nevertheless, it is still in a phase of dynamic development and the scope of the standard is not yet fully clarified. What is clear, is that FPIC is relevant in a number of different contexts and is seen as invaluable in relation to development projects that affect indigenous peoples. FPIC should always be seen as part of a larger framework, together with the right of indigenous peoples to self-determination and their right to effectively participate in decision-making processes on matters of their concern. These legal concepts form an inherent part of any discussion on the rights of indigenous peoples.

FPIC is predominantly present within the 2007 UN Declaration on the Rights of Indigenous Peoples and in regional jurisprudence the concept has been referred to by the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights. Moreover, consent requirements are present in documentation and law of the International Labour Organisation, the Human Rights Committee, the Committee on the Elimination of Racial

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[49] United Nations Permanent Forum on Indigenous Issues, E/2011/43, E/C.19/2011/14 report on the 10th session UNPFII, paragraph 36.

Discrimination, The Committee on Economic Social and Cultural Rights, The 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, The OAS Draft American Declaration on the Rights of Indigenous Peoples, in the framework of the World Bank Group and the Extractive Industries Review, and in a number of national cases. The most relevant instruments are mentioned below.

As mentioned, different international legal documents dealing specifically with indigenous peoples have been adopted, of which *the UNDRIP* is the most recently adopted and the most widely supported.[50] Although the Declaration is strictly speaking not legally binding, a number of its articles can be perceived as reflective or contributing to the formation of customary international law.[51] In this respect it is relevant to mention that James Anaya, the Special Rapporteur on the Rights of Indigenous Peoples highlighted that: "a commitment to these rights should not be obscured by a discussion about whether or not it is a legally binding document, as it had significant normative weight grounded in its high degree of legitimacy as a product of years of struggle and advocacy by indigenous peoples, which was augmented by its grounding in the human rights principles of the United Nations Charter. Implementation of the Declaration should be regarded as a political, moral, and legal imperative without qualification."[52] Moreover, different human rights bodies refer to the UNDRIP in their judgments, decisions, and other documents.[53]

The preamble affirms that the UNDRIP is a standard of achievement that is to be pursued in a spirit of partnership and mutual respect and that recognition of indigenous peoples' rights will enhance harmonious and cooperative relations between the state and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination, and good faith.

Within the UNDRIP, FPIC is enshrined in Article 10 on relocation, Article 11(2) on cultural, spiritual, intellectual, and religious property, Article 19 on legislative and administrative measures affecting indigenous peoples, Article 28 on redress for damage, confiscation, or occupation of their lands, Article 29(2) on the storage and disposal of hazardous materials and, most relevantly, Article 32 on projects affecting their lands, territories, and other resources.

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[50] United Nations Declaration on the Rights of Indigenous Peoples, *A/RES/61/295, adopted by the General Assembly on Thursday September 13 2007, by a vote of 144 in favour, 4 against and 11 abstentions*.

[51] *Cf.* International Law Association, Sofia Conference (2012), Rights Of Indigenous Peoples, Final Report.

[52] Statement by James Anaya, Special Rapporteur on the Rights of Indigenous Peoples, General Assembly, GA/SHC/3982, Press Release, Department of Public Information - News and Media Division - New York, Sixty-fifth General Assembly, Third Committee, 18th & 19th Meetings (AM & PM), 18 October 2010.

[53] These will be discussed throughout this study.

ILO Convention No. 169 of 1989 (ILO 169)[54] is widely regarded as the most important legally binding instrument dealing with indigenous peoples' protection. ILO 169 refers to a requirement of consent with regard to relocation of indigenous peoples in Article 16.[55] Articles 6, 7, and 15 of the Convention provide the general legal framework with regard to the consultation and participation of indigenous peoples. Article 6 requires that indigenous peoples are consulted in good faith through appropriate procedures and, in particular, through their representative institutions, with the objective of achieving agreement or consent, whenever consideration is being given to legislative or administrative measures that may affect them directly.[56]

The *Convention on Biological Diversity* (CBD), adopted during the Earth Summit in Rio de Janeiro in 1992, promotes biodiversity, sustainable use, and the sharing of benefits arising out of the utilization of genetic resources. The CBD includes requirements for national reporting of efforts to implement the provisions of the Convention. Noteworthy provisions are firstly Article 8(j) on respect for indigenous and local communities in relation to the conservation and sustainable use of biological diversity. Article 8(j) calls for consent, participation, and benefit-sharing models in relation to indigenous customs and traditional knowledge. Other relevant provisions are Article 10 on the sustainable use of components of biological diversity and Article 17 on the exchange of information. Relevant to mention is also Article 9 on traditional knowledge and genetic resources of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, which was adopted on October 29, 2010.

Recent developments within the Inter-American Human Rights System, foremost in the judgments and decisions of the Court and Commission respectively, stress the need for effective mechanisms for the participation of indigenous peoples and indicate the necessity to consult and under certain conditions obtain consent from indigenous peoples in relation to decisions that affect them through culturally appropriate processes.

Most importantly, the Court held in Saramaka People v. Suriname that in ensuring the effective participation of members of the community, the state has a duty to actively consult with the community according to their customs and traditions. This duty requires the state to both accept and disseminate information and entails constant communication between the parties. These

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[54] ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entry into force 5 September 1991.

[55] Article 16(2) ILO 196 reads: "Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent."

[56] A/HRC/15/35, General Assembly Distr.: General, 23 August 2010, Human Rights Council, Fifteenth session. Item 5, Human rights bodies and mechanisms, Progress report on the study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, paragraph 18.

consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.

Additionally, the Court considered that regarding large-scale development or investment projects that would have a *major impact* within the community's territory the State has a duty to not only consult with the community but also to obtain their free, prior and informed consent, according to their customs and traditions.[57] The African Commission on Human and Peoples' Rights has affirmed this view in a recent decision concerning the Endorois community in Kenya.[58] Both cases will be studied in detail in Part V of this study.

In relation to the *implementation* of FPIC processes, there are a number of studies that aim to inform guidelines on how to shape such a process properly. These studies have taken place in amongst others: the Congo basin, the Philippines, Australia, and within the framework of the World Commission on Dams and the Forest Peoples Programme.[59] The most comprehensive implementation models for FPIC can be found in a number of voluntary initiatives concerning sustainable commodity use. These models will be subject to review in Part V. Although practice reveals shortcomings in implementing FPIC processes, it also provides some good examples and indicates the potential of FPIC to generate mutually beneficial constructive agreements. Nevertheless, these voluntary initiatives may go further than what is strictly speaking legally required and are devised within specific areas.

In short, FPIC is present in a variety of different international legal documents and is a key principle that guides decision-making processes between indigenous peoples and other actors. FPIC processes include extensive consultation and participation by indigenous communities through culturally appropriate procedures in decision-making processes that affect them. Such processes may include the option of withholding consent depending on the impact and nature of the decision under discussion or the nature of the affected rights.[60] It is imperative for any given FPIC process that it is conducted in good

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[57] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), Paragraph 133 and 134. Emphasis added.

[58] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010.

[59] See e.g.: Lewis J, Freeman L and Borreill S, 'Free, Prior and Informed Consent and Sustainable Forest Management in the Congo Basin, A Feasibility Study conducted in the Democratic Republic of Congo, Republic of Congo and Gabon regarding the operationalisation of FSC Principles 2 and 3 in the Congo Basin', July 2008. Cariño J, 'Indigenous Peoples' Right to Free, Prior, Informed Consent: reflections on concepts and practice', Arizona Journal of International and Comparative Law, 2005. Colchester M and Ferrari M F, 'Making FPIC Work: Challenges and Prospects for Indigenous Peoples', Forest Peoples Programme, June 2007.

[60] E/C.19/2005/3, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 17 February 2005, presented at the Fourth session of the United Nations Permanent Forum on Indigenous Issues, New York, 16-27 May 2005.

faith and with the objective of obtaining consent and reaching agreement in a spirit of cooperation. The following paragraph will explain how FPIC will be examined in this study.

I.4 Structure and Approach

This study is divided into four parts: principles, procedures, platforms, and practices. The method used is primarily classic international legal research; an examination of the status and underlying concepts of FPIC from a number of legally relevant perspectives. Apart from consulting the usual sources of international law – treaties, declarations, statements by government officials, documents and studies in the context of international organizations, and scholarly literature – special attention will be given to regional human rights bodies' cases, primarily in the framework of the Inter-American human rights system, since it is here that groundbreaking work on the implementation of indigenous rights has been done over the last decade.

Secondly, some informative perspectives from related fields are explored. Considering that FPIC is a concept that is in a stage of dynamic development and that it functions in an area that is on the crossroads of international politics and law, a number of insights from political theory will be inspected. This will help to get a better view of the context in which FPIC is developing and will contribute to a better understanding of its justifications. Moreover some "internal comparative law" (related to the field of bioethics) will prove instructive in explaining the role of a legal concept of informed consent, because it is in this field that the notion was first employed.

Two cases – the case of the Saramaka Maroons in Suriname and of the Orang Asli People in Peninsular Malaysia – are particularly important for explaining how FPIC could be implemented and will be examined in detail. Field visits to Suriname and Malaysia were conducted in order to get proper perspectives on the context in which these cases take place. Moreover, the UN Permanent Forum on Indigenous Issues' sessions were visited, since it is within this unique international platform that indigenous voices and perspectives are most clearly presented.[61] Discussions with numerous national and international experts in the field of international law, environmental law and sustainability

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[61] In Suriname, Maroon and Indigenous villages were visited, tribal leaders and their representative organizations consulted. Furthermore, government officials, members of different international organizations and employees and students at research institutes were visited and consulted. Many thanks go to Judge Antônio Augusto Cançado Trindade for his reflections on the Inter-American Court's cases he presided over.
In Peninsular Malaysia, NGO experts, government officials, members from indigenous organizations and Ambassadors were interviewed. Moreover, on-site visits to logging concessions and timber factories in the North (Kedah) were held.
At the UNPFII, numerous expert and indigenous representatives were consulted and views were exchanged with expert researchers from New York University Law School. Particular thanks go to Professor Benedict Kingsbury, for his sharp and insightful comments.

initiatives, land governance, legal philosophy, and human rights were invaluable in contextualizing this project.

In a study like the present one, further methodological choices are reflected by the structure and questions that are developed and posed. Therefore a concise overview of the framework of this study follows.

II. Principles

Part II (Principles) will examine the substantive rights that form the justification for requiring participation rights like FPIC. This part answers why FPIC is such a central claim indigenous peoples make, a claim that cannot be examined accurately without taking into account its underlying principles.[62] By examining the core rights on which FPIC is based, its normative premises are exposed.[63]

Three central concepts will be subject to investigation: the idea or right of self-determination of peoples, land and property rights, and (sovereignty over) natural resources. This part will examine the following questions: Why is FPIC such a prominent claim indigenous peoples make? What is the scope of the right to self-determination for indigenous peoples? Why are rights to lands and resources so central to indigenous peoples' demands? And what is the relation between self-determination, land and resource rights and participatory provisions like FPIC?

III. Procedures

Part III (Procedures) will build on the findings and interpretations examined in Part II; that self-determination and control over lands and resources are central to indigenous peoples' claims and that respecting these claims can only be achieved with the effective participation of the indigenous peoples involved.

In the first paragraphs, the right to effective participation will be explored while in the second part, the strongly related concept of free, prior and informed consent will be more closely inspected.

III.2 Effective Participation

This paragraph will start with exploring why effective participation is such a central idea within the international legal protection of indigenous peoples.

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[62] Claims are often being presented in the form of rights, the language of UNDRIP is clearly one of rights, but its legal status is subject to different interpretations. See Allen S and Xanthaki A, *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, (Hart Publishing, 2011), p. 239.

[63] According to Kymlicka, the normative account is important, but a richer one is needed, in which these claims get negotiated, adopted or contested in western democratic politics. This richer account is also necessary if we want to understand how these policies might be adopted outside the sphere of western democratic states. See: Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007).

Questions that will be treated are: What is the content of the right to effective participation in contemporary international law concerning indigenous peoples? Why is effective participation so central to indigenous peoples' claims?

The questions posed are not exclusively of a legal nature but also concern political issues. James Tully's theory on intercultural constitutional dialogue will be explored and serves as a general framework for the interpretation of the legal model that this study examines. Throughout the paragraphs in part III, it is argued that such a fair intercultural dialogue is a necessary precondition for any FPIC process, and the following question is explored: Which political principles sustain a legal model for the implementation of indigenous peoples' rights to self-determination, lands and resources?

III.3 Free Prior and Informed Consent

After having examined the broader idea of effective participation, the concept of free, prior and informed consent is inspected from different perspectives. The different elements; free, prior, informed, and consent are considered in turn, and the functions, justifications, and relevant principles connected to FPIC are exposed. Questions that are discussed are: How could the different elements of FPIC be explained?; why is it so important that consent is given "free, prior, and informed?"

III.3.1 Free

In order to come to an understanding of what it means that consent has to be given "freely" Philip Pettit's theory of freedom is studied. Pettit's theory is a very attractive one for exploring the meaning of freedom in the context of FPIC since it argues that freedom is best conceived as a situation in which an agent exercises *discursive control* in an interpersonal setting. Freedom is qualified as a capacity that exists in relation to others. This is the situation in which FPIC functions. Furthermore, Pettit's arguments reveal which political ideal should be guiding in relations between indigenous peoples and states: the principle of *non-domination*. This paragraph will investigate these questions: What could be meant by "free" in FPIC processes?; which political principle promotes such freedom?

III.3.2 Prior

It seems obvious that consent has to be obtained *prior* to the commencement of any project that is intrusive on indigenous rights, but it is not only before such projects start that FPIC is relevant. An act of "consenting" does not only function as a procedural justification for what otherwise would count as an infringement upon rights, it can also serve as the basis for a new relation between the actors involved, for instance when a transnational corporation

carries out a long-term mining or logging project on indigenous lands.[64] Therefore, the question is posed whether FPIC should only function until the moment of the decision, *ex ante*, or that it should continue to guide the process *ex post*? In that light, the central question is: What could be a proper description of the prior requirement?

III.3.3 Informed

The requirement that consent has to be *informed* will be dealt with in the paragraphs on "information and communication." It is suggested that the focus should not only be on what kind of and how much information is made available but also, and maybe even more, on the way the communication between the parties is modeled. Highly instructive in this respect is the theoretical debate on informed consent procedures in bioethics. As a legal requirement, informed consent is rooted in this field and it became a core principle of medical research and practice after the Second World War. In examining informed consent from this perspective, a number of valuable insights on information, communication, and informed consent processes in general will be gained. The debate on informed consent in the medical context has been held for over fifty years now, and a number of informative views and misconceptions about informed consent that will be useful for FPIC's application in relation to indigenous peoples can be exposed in this way. The questions this paragraph attempts to tackle are: What should be taken into account when explaining the informed requirement?; what is the role and function of a legal "informed consent" requirement?; which (additional) standards should be taken into account in relation to the "informed" requirement?

III.3.4 Representation Issues

This paragraph will be concerned with the problems that might arise in relation to representation when conducting FPIC processes. Consenting necessarily entails an act of representation, and a number of different obstacles might arise in this respect, e.g. in relation to all sorts of situations of overlap, the (relative) isolation of some indigenous groups, and so called "illiberal" practices within communities. This paragraph will therefore consider: Which issues may require special attention when operationalizing FPIC processes in relation to representation?

III.4 Conclusions on Procedure

The conclusions of part III will combine the insights from the preceding paragraphs and will illustrate the theoretical framework underlying FPIC and

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[64] *Cf.* Brownsword R and Beyleveld D, *Consent in the Law* (Oxford, Hart, 2007).

possible explanations of its different elements. These are taken into account in later parts, where legal and quasi-legal systems for the implementation of FPIC are examined.

IV. Platforms

IV.1.1 International Diffusion FPIC standards

Part IV (Platforms) will explore legal standard setting and diffusion of FPIC norms in an international context. It will be illustrated that FPIC norms are widespread and taken up as a requirement in different international and regional standards and documents. This paragraph provides an overview of the existing platforms that enshrine FPIC standards. Therefore, the main questions are: Where can we find FPIC norms in international legal and policy documents and statements?; how is FPIC interpreted in these different settings?

IV.1.2 The UN Mechanisms

This paragraph will explain the structure of the special mechanisms that are in existence in the context of the United Nations. The Special Rapporteur, the Expert Mechanism, and - perhaps most importantly - the United Nations Permanent Forum on Indigenous Issues are the three entities that aim to promote and protect indigenous rights. Their views and work on FPIC and participation in decision-making are therefore particularly important. Consequently, the question that is explored in this paragraph is: Which UN mechanisms deal specifically with indigenous peoples' rights and how do they promote effective participation and FPIC?

V. Practices

In the final part of this work – (Practices) the most developed and progressive systems for the implementation of FPIC and related rights to self-determination, land, and resources are explored. Two specific perspectives are taken. Firstly, a number of important cases and decisions in the context of the Inter-American Human Rights System are explored and explained to get to a proper understanding of the contemporary *legal status* of FPIC. Secondly, a number of the most developed and progressive implementation models for FPIC on the project level are examined in the context of *voluntary initiatives* concerning sustainable commodity use.

V.1 Case Law

This paragraph will be concerned with the developments regarding FPIC and indigenous rights in the Inter-American Human Rights System. The Inter-American Court and Commission have developed extensive documentation and case law on indigenous land rights and effective participation.

A number of key-cases before the Court and Commission will be described and commented upon, after which the current "OAS model" about property, participation, and consent is exposed. Although the focus lies on the Inter-American system, cases from other regions will also be considered. The main questions of these paragraphs are: How do the regional human rights bodies explain indigenous rights to self-determination, lands, and participation? What is the most comprehensive legal interpretation that supports this system? The case of the Saramaka People v. Suriname will be explored in-depth, since this is the most important decision for explaining FPIC. Moreover, the Saramaka case comprises earlier jurisprudence on land and resource rights and provides a stepping-stone for later developments in and outside the OAS area.

V.2 Implementation Models in Voluntary Initiatives

In the final paragraphs of Part V a number of voluntary initiatives concerning sustainable resource use will be examined. It is within these initiatives that the most comprehensive and progressive implementation models for FPIC on the ground can be found. Furthermore, it is also in the context of these initiatives that most action is taken in order to promote effective implementation of FPIC. In this dynamic setting, the following questions will be leading: What practical models for implementing FPIC processes on the project level can be found?; Which are the most comprehensive or adequate ones and which guidelines do they generally propose? Are these models in line with contemporary international law concerning indigenous peoples?

The second case – besides Saramaka People v. Suriname – that will be explored in detail is the situation of the Orang Asli of the Malaysian Peninsula and their experiences with sustainable timber certification schemes. This case will illustrate a number of complexities that may arise when FPIC processes are being implemented.

Scope and Final Introductory Remarks

In the final conclusions the answers to the main questions of this study will be provided. The frameworks and guidelines developed and examined in this study will hopefully contribute to a better understanding of a very dynamic but immensely important principle for the protection of indigenous peoples worldwide.

In suggesting – firstly – a framework that sustains and accommodates indigenous rights to self-determination and FPIC and – secondly – possible directions for its effective implementation, the focus will be on decision-making processes that affect indigenous peoples' lands, territories and resources, since it is in this area that the most pressing problems arise.

II. PRINCIPLES

For a proper understanding of FPIC, it is essential to examine its international legal roots. This is particularly important because the legal status of FPIC is unclear and because consent requirements derive from their underlying values or rights. This part is called Principles because the underlying concepts that legitimize and justify an FPIC requirement will be inspected. For indigenous peoples, *self-determination* is a fundamental claim they make using the language of international law. As will be argued, self-determination for indigenous peoples has cultural, political, and economic elements and *rights to lands and resources* are essential to realizing indigenous self-determination. To understand FPIC, it is essential to study these rights or principles, given that preventing infringement upon them is the reason for requiring FPIC.

This part will focus mainly on self-determination of peoples in order to expose its contemporary meaning for indigenous peoples. Related rights to lands and resources will also be explored to some extent, however, as the remainder of this work will examine these rights in detail, an introduction will suffice here. It will be shown what kind of interpretations of self-determination could work for indigenous peoples, since their situation is quite different from other subjects in international law.

In short, Part II - Principles - describes the foundations, the underlying principles, that justify or call for FPIC. First, it will be examined whether and in what way FPIC has a legal basis in contemporary international law. Secondly, it will be demonstrated that effective participation and FPIC are essential for operationalizing rights to self-determination, lands and resources. Thirdly, it will be argued that FPIC is such a controversial concept, precisely because it is contingent upon rights to self-determination, land, and resources, and these concepts are themselves contested and not absolute.[65] Effective implementation of FPIC depends on adherence to these principles and they cannot be considered apart from each other.[66]

II.1 Self-Determination

II.1.1 Introduction

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely

[65] These second and third arguments will be further developed throughout this study.
[66] Moreover, explaining the connection between FPIC and other, more fundamental international legal norms, may increase willingness to comply with FPIC, since this enforces its justification.

pursue their economic, social and cultural development.[67]

The idea of self-determination is the heart and soul of the international indigenous peoples movement. It is their core claim and, as James Anaya – the second Special Rapporteur on the Rights of Indigenous Peoples – has consistently argued, no discussion on indigenous rights and international law can do without covering the principle of self-determination.[68] Moreover, and most importantly for our purposes, FPIC is time and again mentioned as one of the essential instruments for exercising this right.[69] A detailed treatment of the substantive claim to self-determination is essential for this study since it underpins the more procedural FPIC principle.

The cornerstone of the UN Declaration on the Rights of Indigenous Peoples is the right to self-determination as enshrined in Article 3. It is framed almost identical to the wording of the common Article 1 to the two 1966 Human Rights Covenants: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESCR).[70] The UNDRIP grants indigenous peoples the right to self-determination, which is regarded as the paramount source of legitimacy for most of the other provisions in the Declaration and the core principle of indigenous peoples protection.

Self-determination is essentially the right to choose one's own pace and path of development. In the context of indigenous peoples, it will be argued that it is primarily a participatory principle, because indigenous peoples are forced to enter into relationships with institutions of the states in which they reside.[71] Therefore, FPIC is an essential procedural element for the exercise of self-determination. As will be discussed at length later on in this study, FPIC is also essential for respecting indigenous peoples' rights to lands and resources. These rights are probably the most important legal guarantees indigenous peoples need in order to be "self-determining."

Although its contemporary understanding does not focus on an external right to secession, recognition of indigenous peoples' right to self-determination lies at the heart of their claims. Self-determination can be exercised in different

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[67] United Nations Declaration on the Rights of Indigenous Peoples, UN A/RES/61/295, Article 3.

[68] Anaya S J, *Indigenous Peoples in International Law* (Second Edition, Oxford University Press, 2004), p. 97.

[69] E/2011/43-E/C.19/2011/14, Economic and Social Council, Official Records, 2011 Supplement No. 23, UN Permanent Forum on Indigenous Issues, Report on the tenth session (16-27 May 2011, New York), p. 7 ff. "As a crucial dimension of the right of self-determination, the right of indigenous peoples to free, prior and informed consent is also relevant to a wide range of circumstances in addition to those referred to in the Declaration."

[70] Common article 1 to the ICCPR and ICESCR grants the right to "all peoples."

[71] In general, indigenous peoples do not have "exit rights."

ways,[72] and the debate over whether self-determination for indigenous peoples could lead to independent statehood has arguably frustrated the more significant discourse about its intra-state scope and content.

This emphasis in academic inquiry on whether self-determination for indigenous peoples involves rights to secession (to form a state) seems counterproductive, since it prevents substantive debate about its intra-state meaning. For indigenous peoples, this is the more fundamental issue: What could be understood by self-determination for indigenous peoples, as an intra-state right?

The distinction between internal and external self-determination is arguably flawed but nevertheless proves instructive in explaining the concept of FPIC. Moreover, the external-internal debate seems to obscure another implicit concern of states. Where in most cases it is evident that indigenous populations do not aspire independent statehood, a substantive right to self-determination that works within the framework of the existing state, seen in light of the broader developments in relation to land rights and requirements of consent, might have profound implications of a redistributive nature. Particularly in relation to rights to land and natural resources, these developments are only reluctantly accepted by states, if they are accepted at all.

Different attempts have been made at clarifying and conceptualizing the meaning of the idea. James Anaya for instance, distinguishes between constitutive and ongoing (substantive) self-determination. Ben Kingsbury emphasizes the importance of the relational element of indigenous self-determination.[73] Further research on forms of indigenous self-determination is needed to find out in which way indigenous peoples can exercise self-determination and related rights. This work argues that the UNDRIP is instrumental in this respect, because its provisions indicate those areas that are most important for indigenous peoples' exercise of their right to self-determination.

According to some authors, indigenous self-determination should be seen as an umbrella provision and it can be broken up into a bundle of rights.[74] Among the most important for indigenous peoples are the right to preserve cultural identity, to have collective authority regarding decisions related to the land and

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[72] *Cf.* African Commission on Human and Peoples Rights, Katangese Peoples' Congress v. Zaire, , Comm. No. 75/92, 1995.

[73] See, Anaya S J, *Indigenous Peoples in International Law* (Second Edition, Oxford University Press, 2004). Contrary to a division between internal and external self-determination, Anaya distinguishes between constitutive and ongoing self-determination. Also see, Kingsbury B, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law', New York University Journal of International Law and Politics 34, 2001-2002. Kingsbury emphasises the relational aspect of indigenous self-determination.

[74] *Cf.* Anaya S J, *Indigenous Peoples in International Law* (Second Edition, Oxford University Press, 2004). *Also see*, S.J. Rombouts, *Tracing Free, Prior and Informed Consent, On Developments in International Law and Legal Doctrine that Shape a Contemporary Principle Favouring Indigenous Rights*, Master Thesis, Tilburg University, 2008. (available upon request).

territory in which they live, and to determine the nature and scope of development activities within that territory.[75] Others aim for a more holistic view of self-determination, in which the legal perspective is only marginally important.[76] A number of these different views and interpretations need to be examined.

The paragraph is structured as follows. Firstly, it is necessary to explore the historical context in which the idea of self-determination was shaped. This part will explain how self-determination transformed from a national to an international political ideal and eventually into a legal right. Importantly, this historical perspective also illustrates the impact of self-determination on the formation of international law and the modern conception of societies in general and will show that it has been predominantly concerned with statehood. Moreover, it will become clear that elements of "free consent" are at the heart of self-determination.

Secondly, the law on self-determination in the post World War II era will be explored, and it will be shown that a narrow interpretation of the law of self-determination does not have all that much to offer to indigenous peoples, considering their particular situation. Thirdly, it will be examined what self-determination could mean for indigenous peoples and a number of different, overlapping, and progressive interpretations of the principle will be considered. Self-determination for indigenous peoples consists of political, cultural, and economic elements. It will be illustrated that for indigenous peoples, rights to their lands and resources are an important way to realize their right to self-determination, and that participatory processes, including FPIC processes, need to be present.

Finally, in the conclusions, a view on indigenous self-determination will be presented and it will be argued that self-determination, rights to lands and resources, and the concept of free, prior and informed consent are closely connected. Throughout this study, it will be demonstrated that FPIC is one of the most important practical expressions of self-determination for indigenous peoples.

II.1.2 Development of the Idea of Self-Determination of Peoples

In order to find out why self-determination is such a key-claim indigenous peoples make, to track its connections to statehood and human rights, and to find out why and how it is so tied up with FPIC – or more generally, a principle of consent – it is necessary to start at the roots of its formation.

Roughly speaking, the evolution of self-determination of peoples can be categorized in four periods or stages relevant for the purpose of this study. First,

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[75] Eide A, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century', Netherlands Yearbook of International Law, 163, 2006.

[76] See, Corntassel J, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse', 33 Alternatives: Global, Local, Political 105, 2008.

the developments in the early frame will be illustrated. These include the formation of the doctrine on the territorial state and the conception of the right to self-determination of peoples in the period of the French Revolution. The second stage in which self-determination was shaped was the period of the League of Nations in the aftermath of the First World War. In this period, Lenin and Wilson shaped the doctrine and proclaimed self-determination on the international level, albeit for very different reasons. Thirdly, in the years after the Second World War, with the birth of the United Nations and its policy on decolonization, self-determination was apprehended again and molded into a legal standard. Finally, it will be argued that we have arrived in a new phase in the evolution of self-determination: the contemporary, postcolonial era conception of the right for peoples, which also explicitly includes indigenous peoples. These four phases will be briefly examined in order to gain a genuine understanding of the scope of self-determination for indigenous peoples.

Before describing these phases in which the concept of self-determination took shape, it is useful to briefly touch upon some of the basic concepts and idiom that surround the debate on self-determination.

II.1.2.1 Self-Determination and its Vocabulary

A *people* is one of the concepts in international law that has proven hard or sometimes even unfeasible to define. What is defined, however, is that peoples are the units that posses the right to self-determination (its subjects). Furthermore, they exercise this right as a collective entity. Peoples are commonly seen as possessing certain national characteristics, while what these are remains largely undetermined. As a legal concept, the implications of the term people can be interpreted differently than in its common meaning.[77]

Similarly, as explained earlier, there is no single agreed definition in international law of indigenous peoples. Two commonly used working-definitions are those mentioned in the Martínez Cobo study and in International Labour Convention No. 169 of 1989. These definitions focus on objective and subjective elements, and both regard self-identification as indigenous people as an important requirement.[78] Collective self-identification seems essential for

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[77] Summers J, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhoff Publishers, Leiden/Boston, 2007), page 2. (Summers, 2007)

[78] In 1983 J.R. Martínez Cobo concluded his, *Study of the Problem of Discrimination against IndigenousPopulations*, and stated that: "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." Cobo distinguished between objective and subjective elements, emphasising self-identification

indigenous or other peoples, but it leaves no room for misrecognition by other actors, like state institutions or majority groups. At the same time, a number of objective criteria can be mentioned, as long as a flexible approach to definitions is taken. A framework definition that is too rigid may lead to exclusion of individuals or groups that may require similar protection.

The concept of a *nation* is often used synonymously with a people.[79] In colloquial and legal use there is little to separate both concepts. One distinction between them could be found in the idea that a nation sometimes denotes something broader than a people denotes and could additionally entail political institutions. Thus, a nation is sometimes used synonymously with a state, whereas for a people, this proves to be more difficult.[80] David Miller defines a nation as a "community of people with an aspiration to be politically self-determining."[81]

A s*tate*, at least for present purposes, can be seen as the self-governing political entity, constituting the basic unit of international law in the classic, post-Westphalian conception of sovereign states. It comprises the set of institutions that a nation or people may aspire to possess for themselves.[82] For

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as indigenous as invaluable. See: Cobo Conclusions, E/CN.4/Sub.2/1983/21/Add.8 page 50 at 379 and page 5 at 21 and 22.
In 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples was adopted. The posed definition in Article 1 of the Convention also distinguishes between objective and subjective elements. Noteworthy, ILO 169 explicitly excludes the use of the term "peoples" from its meaning in relation to Self-Determination of peoples:
Article 1
1. This Convention applies to:
(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.
Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, *entry into force* 5 September 1991. Emphasis added.

[79] Benedict Anderson described a nation as an "imagined political community," one that lives only in the minds of those who see themselves as citizens of the same nation. In: Singer P, *One World, the ethics of globalisation* (Second edition, Yale University Press, New Haven & London, 2004), p. 170.

[80] Summers, 2007, p. 3.

[81] Miller D, *On Nationality* (Oxford University Press, 1995) In: Keitner C, *National Self-Determination, The Legacy of the French Revolution* (Oxford University, March 2000), p. 2.

[82] Keitner C, *National Self-Determination, The Legacy of the French Revolution* (Oxford University, March 2000), p.2.

indigenous peoples, however, this is most often not the case. States are the subjects of the principles of territorial integrity and state sovereignty, two notions that are balanced against the principle of self-determination. Although there are many other criteria for defining states, this minimalist definition will suffice for this study.

As James Summers explains, the concept of self-determination of peoples has been shaped by the doctrines of nationalism, liberalism, and international law. Once again, a minimal definition of these concepts will aid in understanding self-determination in its historical context.

Nationalism can be seen as a political doctrine, established in the revolutionary currents of the late 18th century, which thrives on two basic assumptions. First, nationalists believe that the world is divided into nations or peoples. Secondly, their conviction is that "the Nation" or "the People" is the foundation of the state. Consequently, the nation obtains its freedom by the establishment of its own state of which the legitimate form ought to be the nation-state.[83] Nationalists share the belief that individuals can only achieve self-realization and freedom through their nation.[84] Particularly important for international law is the nationalist conviction that peaceful and friendly relations between states can only be obtained through free nations. Therefore, the doctrine of nationalism is a doctrine on state-hood.[85]

The *nationality principle* entails the belief that non-nation-states should be broken up or merged towards nation-states that correspond with peoples.[86] In a nationalist approach, peoples are presented as a homogenous group,[87] a perception that tends to ignore the complex diversity in the sometimes large bodies of nations.[88]

Therefore, where nationalism considers states only legitimate insofar as they represent nations or peoples, *international law* regards states as its basic unit. The two principal sources of international law,[89] conventions and custom, are derived from the intentions and practice of sovereign states.[90] Nationalism is

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[83] Summers, 2007, p. 9.

[84] Summers, 2007, p. 9.

[85] Charles Taylor explained that nationalism in modern politics is a fruit of Romanticism. Nationalism has its roots in Rousseau's notion that the locus of sovereignty must be a *"people"* which is an entity constituted by a common purpose or identity, something more than merely a aggregation of individuals. This root idea was further developed by Herder and his conception of a *Volk,* which is the notion that each people has its own way of being, thinking, and feeling, to which it ought to be true. In European societies, language has been the dominant principle for creating cohesive nation states. See: Taylor C, *Sources of the Self, the Making of Modern Identity* (Harvard University Press, 1989), pp. 414-417.

[86] Summers, 2007, p. 10.

[87] Peter Singer described that on some views of nationality, to be a member of the same nation is like an extended version of being kin. Singer P, *One World, the ethics of globalisation* (Second edition, Yale University Press, New Haven & London, 2004), p. 167.

[88] Summers, 2007, p. 13.

[89] Article 38(1) of the ICJ Statute is highly relevant in relation to the sources of international law.

[90] Summers, 2007, p. 21.

based on nations and peoples, whereas international law is fundamentally state-oriented. Both doctrines, however, are related to the notion of the state. Nationalism requires authentic peoples to exercise self-determination, while positive international law calls for clear and well-defined categories of peoples, through the formation of states, for a consistent application of the right.

Nationalism and *liberalism* are perhaps the two most influential doctrines in relation to the development of self-determination. For our purpose, liberalism can be understood as a doctrine developed during the age of the Enlightenment, during the 17th and 18th century. Its basis proposition states that legitimate political authority derives from individuals, who are free and equal. Liberal states are characterized by constitutionalism, the rule of law, and representative democracy as the best way to guarantee individual freedom.[91] The authority of the government is derived from the people; i.e. the group of individuals composing the population of the state.

Nationalism, liberalism and international law shaped the notion of self-determination throughout history. The following paragraphs will try to explain how they did, and illustrate the different shapes and content self-determination of peoples has taken on, in order to get to contemporary perceptions of the right for indigenous peoples.

II.1.2.2 Westphalia and the French Revolution

Westphalia and State Sovereignty

> Men are naturally free, and the examples of history shewing, that the governments of the world, that were begun in peace, had their beginning laid on that foundation, and were made by the consent of the people.[92]

The major changes that took place over the centuries preceding the peace of Westphalia in 1648 formed the basis for the doctrines of liberalism, nationalism and international law. These doctrines would shape the concept of self-determination. The erosion of the feudal system together with the growth of towns and increasing industrial activities created a more powerful middle class.[93] This led to the need for monarchs to consolidate their power and move towards a more centralized form of nation-building. The centralized approach entailed a conception of sovereignty that worked internally, as an expression of the absolute power of the monarch over his citizens and – externally - against other powers. This formed the foundation for the concept of the territorial sovereign state, conceived after the Westphalian peace treaty.[94] The Westphalian model

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[91] Summers, 2007, p. 31.

[92] John Locke, 1689, Second Treatise, Chapter VIII, paragraph 104.

[93] Summers, 2007, p. 89.

[94] The concept of *Sovereignty* has been used in a variety of contexts and caused much international and intellectual confusion. In the spirit of Emerich de Vattel (1714 – 1767), 16th

provided a structural framework for relations between distinct political and territorial entities.[95]

The English Civil War of 1642 together with the later Glorious Revolution of 1688 revealed nationalist feelings of community and common identity and showed a major reassessment of the nature of political authority.[96] The new conception, led by John Locke (1632 – 1704), founded the basis of government in the consent of the people. His theory, as described in his *Two Treatises of Government*, formed an original liberal theory of government based on the rule of law, individual freedoms, and the wishes of the people.[97] If a government exercised powers beyond its right and infringed the rights of the governed, as a form of tyranny, the power returned to the hands of the governed, who were consequently entitled to create a new form of government.[98] The basis for government was vested in what he called "the body of the nation," although it was ultimately derived from the individual.[99] In Locke's view however, the people were not seen as the sovereign with the right to change and abolish political institutions "at will" (as later conceptions would). Locke's theory was more conservative, leaving change of government as an "ultimum remedium" against tyranny.[100] Locke's theory provided an early liberal view that would pave the way for a more expanded view on popular government and the birth of self-determination as a principle that would be developed about a century later, in the period of the French Revolution.

The French Revolution and the Nationality Principle

> La puissance législative appartient au peuple, et ne peut appartenir qu'à lui.[101]

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century political thinkers like Machiavelli, Bodin and Hobbes, posed the theory of sovereignty as an attempt to analyse the internal structure of a state, reasoning that there must be an entity with supreme legislative power in each state. John Austin (1790 – 1859), a utilitarian thinker and follower of Bentham (1748 – 1832), defined law (in an early positivist conception) as: "the general commands of a sovereign, supported by the threat of sanctions." In this conception, international law was not law at all. By a "shift" of meaning, sovereignty gained its external appearance, as also describing the relation between the ruler of a state towards other states. In contemporary international law, sovereignty is not a fixed legal term, and is often just a synonym for independence used by states to exaggerate their power. See: Malanczuk P, *Akehurst's Modern Introduction to International Law* (7th Revised Edition, Routledge London & New York, 1997), pp. 9 – 18. See Also: Singer P, *One World, the ethics of globalisation* (Second edition, Yale University Press, New Haven & London, 2004), page 148. Singer argues that National Sovereignty itself has no intrinsic moral weight.

[95] Keitner C, *National Self-Determination, The Legacy of the French Revolution* (Oxford University, March 2000), p. 3.

[96] Summers, 2007, p. 93.

[97] Summers, 2007, p. 94.

[98] Summers, 2007, p. 95.

[99] Summers, 2007, p. 95.

[100] John Locke, 1689, Second Treatise, Chapter XVIII, Of Tyranny.

[101] Jean-Jacques Rousseau, *Du Contrat Social*, 1762, Book III, Chapter I.

While the Westphalian peace treaty marked the birth of the territorial, sovereign State, the years of the French Revolution witnessed the birth of the nation-state.[102] In the ideal conception of the nation-state principle pre-political nations should determine the legitimacy of states.[103] This is indicative of the roots of social contract theory, of which Locke, Hobbes, and Rousseau are among the best-known exponents.[104] The origins of the principle of self-determination can be traced back to the philosophical debate surrounding the French Revolution of 1789 and the American Declaration of Independence of 1776. These events are indicative of the objection to the idea that individuals and peoples were mere objects placed at the discretion of the monarch. The reasoning behind the principle was that government should be responsible to the people it governed.[105] Government *with consent of the governed*, that is.

In France, however, the principle of self-determination was first explained as a standard governing the transfer of territory. [106] Unfortunately, in revolutionary France, it was often misused in actual practice. It was apprehended to justify annexation of lands belonging to other sovereigns, like Avignon in 1791 and Belgium in 1793.[107] This *external* form of self-determination thus was not applied very uniformly, and popular plebiscites were only regarded valid when the vote was pro-French.[108] *Internally*, during the period after the revolution, self-determination preserved a limited scope of application as well.[109] Colonial peoples as well as minorities, ethnic, and cultural groups were not entitled to self-determination. The principle, as enshrined in Title XIII of the 1793 Draft Constitution, did not explicitly refer to the right of peoples to freely choose their rulers,[110] as in the common contemporary understanding of "internal" self-determination, which will be examined later on in these paragraphs.

Despite the limited scope and flawed application of the principle in practice, the importance of the French proclamation of the principle should not be

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[102] Keitner C, *National Self-Determination, The Legacy of the French Revolution* (Oxford University, March 2000), p. 2.

[103] Keitner C, *National Self-Determination, The Legacy of the French Revolution* (Oxford University, March 2000), p. 3.

[104] In which the "State of Nature" as described by Locke and Hobbes defined this pre-political society. The most prominent contemporary exponent of Social Contract Theory can be found in John Rawls' "A Theory of Justice" in which he describes his hypothetical "Original Position" (Comparable to the State of Nature) in which rational individuals determine the principles of justice from behind a "Veil of Ignorance."

[105] Cassese A, *Self-Determination of Peoples, a Legal Reappraisal* (Cambridge University Press, 1995, reprinted in 1996), page 11. (Cassese, 1996)

[106] The principle was formally codified in Article 2 of Title XIII of the Draft Constitution of 1793 and eventually re-crystallised in a somewhat shorter and clearer way in Article 53 of the French Constitution of 1958: *" Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées."* See: Cassese, 1996, page 11.

[107] Cassese, 1996, page 11.

[108] Cassese, 1996, page 12.

[109] The terminology "internal" and "external" will be used in different contexts and with different scopes of application regarding Self-Determination doctrine.

[110] Cassese, 1996, p. 13.

underestimated. It expressed the shift from despotic rule towards the enlightenment ideals of democratic government. Contrary to the Lockean conception of popular consent, the French liberals, like Rousseau, believed that governmental institutions could also be erected and abolished "at will" by the people.[111] Nevertheless, the French conception of the principle was primarily concerned with permitting states to justify distribution of territories, and so was applied mostly in its external form.[112]

II.2.2.3 The Vienna Congress and Liberal Nationalism

Another event in the aftermath of the French revolution that shaped self-determination, was the reaction to the Vienna Congress of 1815. The Congress aimed to restore a large number of territories to their former dynastic rulers and create buffer states between the Great Powers.[113] This was condemned by liberals and nationalists as reactionary. The liberal conception of popular government, together with the nationality principle (the idea that the nation and the state should be congruent) challenged this reaffirmation of the division of power in the Vienna system.[114]

The combination of the nationality principle and liberal values led to the concept of *liberal nationalism*. The merger of liberal and nationalist values entailed that in order to create a liberal society with representative institutions, a well functioning system of government, and a strong belief in the rule of law, it would be very feasible to have a sense of solidarity and common identity among the governed. Thus, in order to create a representative government, with popular self-rule, it was viewed as essential to consider these nationalist conceptions.[115]

Liberal nationalism paved the way for the inclusion of the *internal* component of self-determination. Nationalism alone appealed more to the external form of self-determination since it was more concerned with the merger and break-up of states: it required that the nation and the state should be congruent. Liberal theory put the emphasis more on internal principles such as democracy, individual rights, and the rule of law within states. Liberals believed that government is derived from "the people," that is, states should have a representative democratic basis, emphasizing the internal aspects of self-determination. Nationalist ideology states that government is derived from "a people," thereby meaning that the state should correspond with the nation, in that way putting more emphasis on the external aspects. Taken together, liberal nationalism assumed the necessity of a common identity to form a truly free state. John Stuart Mill's words are clarifying:

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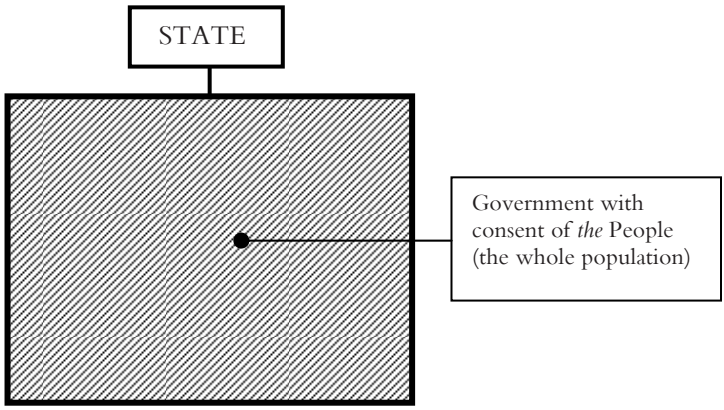
111 Summers, 2007, p. 99.
112 Cassese, 1996, p. 13.
113 The main actors during the Vienna Congress were: the United Kingdom, Prussia, Russia and the Habsburg Empire.
114 Summers, 2007, p. 109.
115 Summers, 2007, p. 110.

> Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow feelings, especially if they read and speak different languages, the united public opinion, necessary for the working of representative government, cannot exist.[116]

Comprised in a simple model, self-determination of peoples in a liberal, nationalist, and liberal nationalist view could be presented as follows. The liberal perception on self-determination is concerned with the people comprising the whole population of a state:

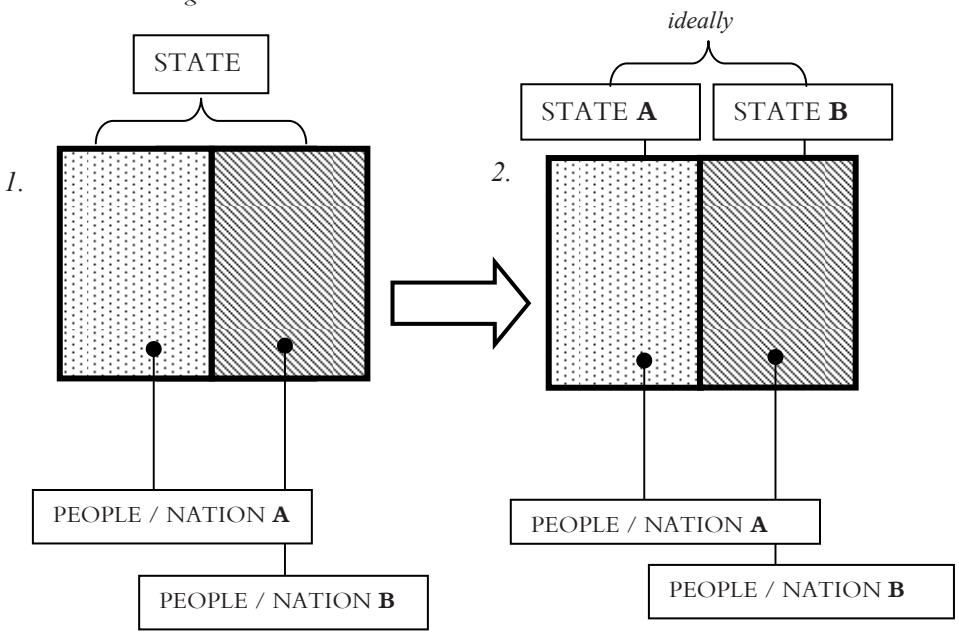
Figure 1: Liberalism.



[116] John Stuart Mill, Considerations on Representative Government, 1861. In James Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, Martinus Nijhoff Publishers, Leiden/Boston, 2007, page 111.

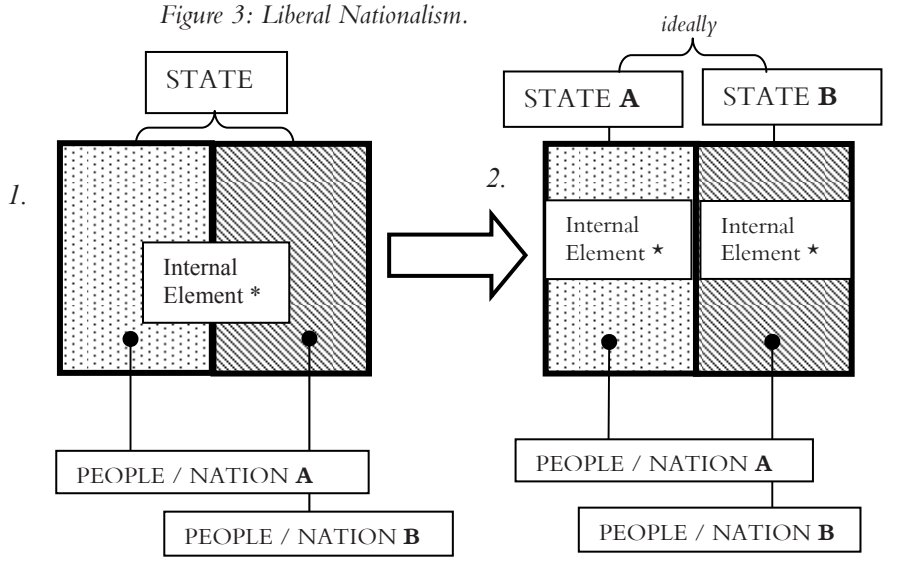
Nationalist ideology assumes that states should be merged or broken up to correspond with peoples or nations:

Figure 2: Nationalism.



In a liberal nationalist model, the ideal concept would be a state which corresponds with a nation or people, and that is internally organized by and with the consent of the governed:

Figure 3: Liberal Nationalism.



⋆ Internal Liberal Element: Government with consent of *the* People (the whole population of the State)

Although the conception illustrated in the last model entailed an enhancement of the concept of self-determination, for culturally distinct minorities and indigenous peoples this liberal nationalist doctrine resulted in practice in forced assimilation and integration into the - often culturally quite different - larger political order.[117] In this light, Francis Fukuyama has a point in observing that: "Most 'liberal' European societies were illiberal insofar as they believed in the legitimacy of imperialism, that is, the right of one nation to rule over other nations without regard for the wishes of the ruled."[118] Nevertheless, liberal nationalism shaped the content of self-determination as operating both internally and externally.

Thus, the roots of self-determination, as a political principle, can be traced down far in history, originating from the liberal social contract theory conviction that government is legitimized through the "consent of the governed," and nationalism, which holds that the nation and the state should be congruent. Taken together, the doctrine of liberal nationalism assumed that popular government and free institutions should be achieved ideally in a state, in which the "nation" or "people" held a common identity and shared values.

II.2.2.3 Lenin, Wilson, and the League of Nations

The second phase, in which self-determination was proclaimed in the international arena, concerns the period in the aftermath of the First World War. The abhorrent outcomes of a intercontinental war fought with modern weapons, resulting in millions of casualties, millions mutilated, and millions in poverty and shock, led to the belief in the interbellum that world peace could only be achieved through the creation of a global organization.[119] This resulted in the birth of the League of Nations, of which US President Woodrow Wilson was the founding father. Together with the events in the currents of the Bolshevik October Revolution of 1917 - in which Lenin was the key figure - this led to a different application of self-determination, as it became a truly international concept.

Lenin

In the wake of the First World War and the Bolshevik Revolution of 1917 the concept of self-determination appeared on the international scene.[120] Lenin was the first to propose the right of self-determination to the international community as a general criterion for the liberation of peoples. To Lenin, self-

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[117] For a discussion on this subject, see: Anaya, 2004, Chapter I.
[118] Fukuyama F, 'The End of History?', The National Interest, 1989.
[119] Noteworthy, the idea of a world peace organisation was of course not entirely new. Examples of this idea can be found in Immanuel Kant's "Zum Ewigen Frieden," issued in 1795 and Jeremy Bentham's "Principles of International Law," published in 1798.
[120] Cassese, 1996, p. 13.

determination was to be the leading principle to liberate oppressed people and consequently spread the socialist revolution throughout the world.[121]

The first elaboration on the principle of self-determination appeared in Lenin's *"Theses on the Socialist Revolution and the Right of Nations to Self-Determination"* (1916), and this was followed by many other Soviet declarations on the subject.[122] For Lenin, Self-Determination had three main components. First, it served ethnic or national groups to freely decide their destiny. This could be achieved by secession or by gaining degrees of autonomy while remaining part of the larger political order. Secondly, it functioned as a guiding principle for territorial ordering in the aftermath of violent conflict. Third, self-determination was an anti-colonial right, aimed at the liberation and independence of all colonial countries.[123] Where the second component resembled the principle as it was used in the period after the French Revolution, the other two components were largely new.

Evidently, in this case, the underlying political philosophy of self-determination was socialism, expressed on the international level with "full equality of nations" and "the right of the oppressed nations to self-determination." Lenin mentioned in his "Theses" that victorious socialism had to go hand in hand with full democracy. Lenin's way of applying self-determination was mainly through promoting secession, expressed not per se through forcible means, but by a free expression of popular vote.[124] Obviously, for Lenin, the ultimate goal of self-determination was not realizing independence for the colonial territories, but the creation of state structures susceptible to socialist world-government. The idea of self-determination was thus apprehended by Lenin as an instrument to spread socialism throughout the world.

Where in time the first and second components became less important, the third (self-determination for colonial peoples) became very influential in international law and in shaping the world of states as we know it today. It is largely due to the Soviet Union efforts that self-determination became enshrined in the UN Charter.[125]

Wilson

President Woodrow Wilson developed an alternative concept of self-determination at the same time Lenin did. His view, as an expression of western democratic theory, was founded in the classic liberal principle that government must be based on the consent of the governed. He thereby emphasized a fourth component of the concept of self-determination, namely that a people should be

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121 Cassese, 1996, p. 14.
122 Cassese, 1996, p. 16.
123 Cassese, 1996, p. 16.
124 Cassese, 1996, p. 17.
125 Cassese, 1996, p. 19.

granted the right to freely choose its political leaders.[126] Self-determination, in the Wilsonian conception meant an *internal* right to self-government. In addition to this variation, Wilson also proposed that self-determination was primarily related to the restructuring of states in Central Europe. Secondly, self-determination was a criterion governing territorial change, and thirdly, it could serve as an instrument for settling colonial claims. Wilson, however, was of the opinion that self-determination had to be reconciled in this last variation with the interests of the Colonial Powers.[127]

There appeared to be three major differences between Lenin's and Wilson's conception of self-determination: first, their clearly distinct ideology, second, Wilson's emphasis on the internal conception, and third, the divergent ways of applying the idea of self-determination in practice. For Lenin it meant immediate liberation for colonial peoples, while Wilson called for a more gradual process of liberal reform.[128]

Wilson's thoughts on self-determination were heavily criticized. The concept was said to be too vague and its consequences underestimated. Moreover, self-determination in Wilson's view was not applicable to *national*, internal matters, like the protection of United States minorities or indigenous peoples.

The Interbellum Influence on Self-Determination

In the end Wilson's draft provision on self-determination, which provided a counterweight for territorial integrity, was not enshrined in the Covenant of the League of Nations.[129] After the Versailles Peace Conference of 1919, self-determination was applied rather arbitrarily and was deemed irrelevant in cases where the people's will would run counter to the victors' political, economic and strategic interests.[130] Furthermore, the Allies did not insist that the newly emerged states would adopt a democratic form of government, i.e. consent of the governed was no formal requirement. Nevertheless, in the spirit of Wilson, the new world organization was called League of *Nations*, instead of *states*, and had in its covenant preamble enshrined that the League was not only one of states, but also of *peoples*.[131]

Moreover, the League appointed a commission of jurists in 1920 to inspect the Åland situation, which led to the eventual granting of far reaching autonomy-rights for the Finnish islands. Although the inhabitants had no right to secession, the commission did acknowledge the possibility of secession for

126 Cassese, 1996, p. 19.
127 Cassese, 1996, p. 21.
128 Cassese, 1996, p. 21.
129 Cassese, 1996, p. 23.
130 Cassese, 1996, p. 25.
131 Summers, 2007, p. 129.

minorities.[132] The reports affirmed that self-determination could be – at least partially – achieved without leading to independent statehood.

Whereas the "Wilsonean" League of Nations eventually failed, the efforts of Lenin and Wilson did pave the way for self-determination to become embedded in international law. This, however, only happened after the Second World War.

II.1.3 The Law of Self-Determination

II.1.3.1 The Period after the Second World War

In the wake of the Second World War, self-determination developed from primarily a political postulate towards a genuine legal standard. As such, it was apprehended and applied extensively, mainly externally, within the colonial context. Self-determination became an international legal norm shaped by treaty law and custom. This paragraph provides a short account on the positive law of self-determination as it was conceived within the different legal instruments created after the Second World War.

The Atlantic Charter of 1941, which proved to be the first step towards the UN Charter, proclaimed self-determination as both a general standard governing territorial changes and as a principle requiring the free choice of rulers by the governed within the sovereign state.[133] The Charter, drafted by Winston Churchill and Franklin D. Roosevelt, thus comprised both external and internal self-determination.[134] While the text seems aimed at a universal right to self-determination, Churchill explicitly noted that self-determination had no bearing on colonial territories and served only to restore "the sovereignty, self-government and national life of the states and nations of Europe under the Nazi yoke" next to providing for "any alterations in the territorial boundaries which may have to be made."[135]

The UN Charter

In 1944, the UK, China, the US, and the Soviet Union drafted several proposals for a foundational document for a new world organization at the Dumbarton Oaks Conference. Self-determination was not explicitly mentioned in these proposals, but in 1945, when the United Nations Conference of International Organization convened in San Francisco, a provision on self-determination was

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[132] Cassese, 1996, p. 29-3.1

[133] Cassese, 1996, p. 37.

[134] The relevant passage of the Charter reads: "... Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them."

[135] Cassese, 1996, p. 37.

enshrined in the UN Charter as a result of the efforts of the Soviet Union.[136] Although the provision identified self-determination as a core objective for the new world organization,[137] it remained largely unclear how the principle should function in practice and the concept was subject to different forms of criticism.[138]

Therefore, the Drafting Committee agreed on four points guiding the use of self-determination. First, the principle had to correspond closely to the will and desires of peoples everywhere and should be clearly stated in the UN Charter.[139] Second, the principle conformed to the Charter purposes only insofar as it meant a right to self-government, not secession.[140] Third, the principle extended to a possible amalgamation of nationalities if they freely chose this course.[141] Finally, but very important, it was agreed that an essential component of the principle of self-determination was "the free and genuine expression of the will of the people."[142]

At first sight, these four points seem to go quite far, but in fact states were unable to positively define self-determination and did not uniformly distinguish between internal and external self-determination. It did not entail a right to independence and only suggested that states should grant some form of self-government and sovereignty to communities under their jurisdiction.[143] Self-determination had to go hand in hand with the promotion of friendly relations among states. This severely limited its scope, since it could easily be set aside by arguing that its exercise could possibly lead to conflict between states. More importantly, the Charter did not impose direct and immediate legal obligations on states since self-determination was framed in terms of a goal or program of the UN.[144]

In spite of all these ambiguities and limitations on self-determination, the principle or right[145] was recognized for the first time in a multilateral treaty, the UN Charter, which turned out to be one of the most important pieces of legislation for the new world community.[146] The adoption of the UN Charter

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136 Cassese, 1996, p. 38.
137 Article 1 (2) of the UN Charter states as one of the goals of the organization: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and tot take other appropriate measures to strengthen universal peace."
138 Apart from fear of secessionist movements, objections were raised with regard to a misuse of the right for annexation or military invasions. See: Cassese, p. 40
139 UNCIO, vol. VI, 296, in Cassese, 1996, p. 40.
140 UNCIO, vol. VI, 296, in Cassese, 1996, p. 40.
141 UNCIO, vol. VI, 704, in Cassese, 1996, p. 40.
142 UNCIO, vol. VI, 455, in Cassese, 1996, p. 40. See also: Franck T 'The Emerging Right to Democratic Governance' Am. J. Int'l L. 86, 1992.
143 Cassese, 1996, p. 42.
144 Cassese, 1996, p. 43.
145 For a discussion on whether Self-Determination is a principle or a right, see: Summers, 2007.
146 Cassese, 1996, p. 43.

thus marks an important turning point in history for self-determination. From a political postulate it now became an international legal standard. Although at first intended to guide UN action only, it would gradually become binding on sovereign states as well.[147]

In the years following the adoption of the UN Charter the emphasis shifted from self-determination as a principle guiding peaceful relations between sovereign states towards an instrument aimed at achieving independence for colonial territories. Socialist doctrine together with the anti-colonial movement transformed self-determination into an external right to independence.[148] Article 1(2) was eventually conceived as a legal entitlement to decolonization, with the UN serving as the international forum for guiding the process of gaining independence for the colonial territories overseas through its trusteeship doctrine, (the so called "blue water thesis") guided by the principle of *uti possidetis iuris*.

UN GA Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, together with UN GA Resolution 1541 on the principles that should guide UN members in the application of the right to self-determination were the two most important resolutions for determining whether a right to independence existed.[149] These were in some sense supplemented by the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN.[150] The 1970 Declaration included an important "saving clause" which provides for a duty for states to realize an internal right to self-determination for its people which entails representative government without discrimination. Failure to do so might result in the emergence of a remedial right to secession for certain groups.[151]

The external application of the right to self-determination, however important for shaping our world as it is today, will not be elaborated upon much further since the focus of this study lies within the internal conception of self-

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147 Cassese, 1996, p. 43.

148 Cassese, 1996, p. 44.

149 General Assembly Resolution 1514(XV) (Declaration on Granting Independence to Colonial Countries and Peoples) and General Assembly Resolution 1541(XV) of 1960.

150 Resolution adopted by the General Assembly, *Adopted on a Report from the Sixth Committee (A/8082),* 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

151 The clause reads: Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above *and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.* Italics added. For a detailed treatment see: Cassesse, 1996. *Also see* Driest S F Van den, *Remedial Secession, A Right to External Self-Determination as a Remedy to Serious Injustices* (School of Human Rights Research Series, Intersentia, 2013).

determination. [152] Internal self-determination is a contested term and it may obscure the meaning of self-determination for indigenous peoples.

Whereas the external component was shaped by the socialist and third world country political climate, the Western conception of self-determination still embraced an internal principle aimed at the democratic freedom of every people. The principle was thus conceived as the fundamental criterion for democratic legitimization of governments, but this meant governments of nation-states.[153]

The 1966 Human Rights Covenants

Prior to the adoption of the Universal Declaration of Human Rights in 1948, it became clear that the UN members aspired to adopt legally binding treaty provisions regarding the general principle of respect for human rights. These were eventually enshrined in the International Covenant on Civil and Political Rights (ICCPR)[154] and the International Covenant on Economic Social and Cultural Rights (ICESCR)[155] in 1966. In accordance with liberal views on individual freedom, the Western countries initially only wanted to include individual human rights, but under pressure from the Soviet Union, and with support from the developing countries, a collective provision on self-determination was eventually enshrined in common Article 1 to the Covenants.[156] It reads as follows:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-

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[152] Also see: Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 S.C.R. 217. For an extensive examination see: Cassese, 1996 and Summers, 2007.
[153] Cassese, 1996, p. 47.
[154]International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.
[155] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.
[156] Cassese, 1996, p. 49.

> determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The codification of self-determination, while at first heavily contested, formed the core Article of the Covenants. The wording is – almost – identical to the right enshrined in Article 3 of the UN Declaration on the Rights of Indigenous Peoples. An elaboration on its content is useful.

Peoples are entitled to exercise their right to self-determination "freely" to determine their political status and their social and cultural development. With regard to *internal* self-determination, the chosen formulation "freely" requires that peoples choose their legislator free from any manipulation or undue influence from the national authorities.[157] Internal, democratic, self-determination should be understood as providing the opportunity for genuine expression of the popular will. Therefore, it encompasses a general right justifying the exercise of the other, individual, rights in the Covenants, in particular the political rights. Article 1 established a permanent link between self-determination and the exercise of the individual rights enshrined in the Covenants as it developed into a legal principle guiding internal decision-making processes.[158] Self-determination in this way became inextricably linked to democratic decision-making, providing a continuous or ongoing right.[159]

Externally, Article 1(1) imposes the requirement that the political institutions of a state should be free from outside interference.[160] Territorial integrity and state sovereignty (the counterweight principles of self-determination) can be distinguished here as providing a prohibition of interference by other states. Paragraph 2 expands self-determination to control over natural resources, which appears to be the logical corollary of self-determination as the right for peoples to freely choose by whom they are governed.[161] However, the principle of sovereignty over natural resources is highly controversial within the context of indigenous peoples, as the next paragraphs will illustrate.

Paragraph 3, on non-self-governing and trust territories, deals with achieving independence for colonial territories. In contemporary international law, the provision has lost most of its significance, since most of the colonial territories have already gained their independence. While in wording, self-determination under Article 1 common to the 1966 Human Rights Covenants applies to all *peoples*, in practice it only applied to entire populations in independent sovereign states, entire populations of colonial territories that had

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157 Cassese, 1996, p. 53.
158 Cassese, 1996, p. 54.
159 Whereas the original draft read "All peoples *shall have* the right to self-determination" the final text reads "All peoples have the right to self-determination" thereby emphasizing the fact that self-determination is exercised in a permanent, continuing manner. See: Cassese, 1996, p. 54. Also see: Franck T 'The Emerging Right to Democratic Governance' Am. J. Int'l L. 86, 1992.
160 Cassese, 1996, p. 55.
161 Cassese, 1996, p. 55.

not yet gained full independence,[162] and populations living under foreign military occupation.[163] In positive international law, under the regime of the 1966 Covenants, peoples living within sovereign states and minority groups are not entitled to self-determination. This is where the controversy regarding the legal implications of the right for indigenous peoples becomes visible. The emphasis was on external self-determination for colonial peoples, not on separate peoples that continue to be politically associated with a state.

Conclusions on the Post World War II eriod

In short, initially self-determination, as it entered the realm of international law with its codification in Article 1(2) of the UN Charter, only meant a right to self-government and proclaimed an objective for the UN and its Member States. However, under the pressure of the Soviet Union and the anti-colonial movement, it developed into a legal entitlement to decolonization, with the UN monitoring and guiding the process of independence for colonial territories.

This led to the adoption of Article 1 common to the 1966 Human Rights Covenants. With the adoption of the Covenants, self-determination gained a broader meaning than just an anti-colonial concept.[164] It encompassed a right to internal self-determination, but this meant the right for the whole population of an independent state to freely choose its rulers, its government. Although the right only applied to whole populations, it was the first time that an *international* legal provision proclaimed the right of a people to democratic rule. Nevertheless, it did not apply to peoples or nations within states. Thus, although self-determination gained its internal component in international law, there was still no noticeable shift away from the state-centered approach. In the next paragraph, the evolution of self-determination for indigenous peoples in the post-colonial era will be examined.

II.1.4 Beyond the State: Self-Determination for Indigenous Peoples

This paragraph describes how self-determination has become a right indigenous peoples claim. The concept of self-determination is largely disconnected from independent statehood, since indigenous peoples by and large do not aspire secession. The challenges to indigenous self-determination are myriad and widespread, and the debate about its content is far from over with the adoption of the UN Declaration and its provision on self-determination. This and the following paragraphs will illustrate that indigenous self-determination has important political, cultural and economic elements, all of which are contested and all of which are related to FPIC.

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[162] The boundaries were kept intact, guided by the principle of "*Uti Possidetis Iuris*."
[163] For an elaboration on the assessment of these categories, see: Cassese, 1996.
[164] Cassese, 1996, p. 65.

II.1.4.1 Self-Determination for Indigenous Peoples during the Post-Decolonization and Post Cold-War period

At the start of Part II, the right to self-determination was cited as it is enshrined in the UN Declaration on the Rights of Indigenous Peoples. As described above, self-determination evolved towards a democratic right, intimately tied to human rights precepts after the Second World War, through the UN Charter and the UN Human Rights Covenants. However, this internal right to self-determination only applied to whole populations of states.[165] The fourth period, in which arguably a right to self-determination for indigenous peoples was recognized, is indicative of a trend in international law: an expansion of the right to nations or peoples within states, not constituting the whole of the population.[166] This reconceptualization of self-determination, in which sub-state groups can be its subject, is essential for this study and for a proper understanding of free, prior and informed consent.

The shift to self-determination for indigenous peoples was caused by a change in political and legal mode of thought. In relation to indigenous peoples' and minority protection, the focus had always been on combating discrimination and integration into the larger political order. This required positive measures, which are inherently of a temporal character in contrast to the latter conception of indigenous self-determination as facilitating a continuous process.[167] The climate changed in the 1970s, partly under the influence of the 1966 Human Rights Covenants[168] and because indigenous peoples themselves found ways to make their voices heard.

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165 The 1975 Helsinki Final Act emphasized that the internal dimension of self-determination is best seen as a democratic right. For an excellent discussion see: Cassese A, *Self-Determination of Peoples, a Legal Reappraisal* (Cambridge University Press, 1995, reprinted in 1996), page 278-296.

166 Evidently, this is a very slow trend, *Cf.* Crawford J, 'The Right of Self-Determination in International Law, Its Development and Future', in: Alston, *Peoples Rights* (2001), p. 64. "[…] this does not mean that the only 'peoples' relevant for international purposes are the whole people of each state. International lawyers should resist the conclusion that a widely-used term is to be stipulatively and narrowly defined, in such a way that it reflects neither normal usage nor the self-perception and identity of diverse and long-established human groups. That would make the principle of self-determination into a cruel deception: it may be so, but the presumption is to the contrary, and our function should be to make sense of existing normative language, corresponding to widely-regarded claims of rights, and not to retreat into a self-denying legalism."

167 Allen S and Xanthaki A, *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, (Hart Publishing, 2011), p. 238 ff. Stephen Allen explains that human rights approaches to problems of group discrimination have focussed on positive action. The rationale for such measures is substantive equality, but when the discriminatory practices are corrected, the need for such measures ceases. It is therefore problematic to phrase such measures in the language of rights, which are not of a temporal character.

168 Eide A, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century', Netherlands Yearbook of International Law, 163, 2006, page 163.

James Anaya distinguishes two significant developments after the end of the Cold War and the decolonization period. Related to the decline of the Soviet authoritarian system, a renewed worldwide faith arose in non-authoritarian democratic institutions, linked to the notion of subsidiarity, the idea that decisions can often best be made at the most local level. Bottom-up approaches are preferred over top-down approaches. The second development can be characterized as the embrace of cultural pluralism brought about by the fading classic notion of the culturally or ethnically homogenous nation-state that was explored at the beginning of this part.

Thus, instead of emphasizing non-discrimination and integration, the focus shifted towards self-determination and cultural integrity, towards accepting that indigenous peoples have their own cultures, distinct from the larger political order in which the "indigenous nation" is placed. This entails the belief that the right of indigenous peoples to freely practice their culture and traditions in accordance with their own institutional structures and customs is invaluable in protecting them.[169] Acceptance of intrinsic worth of cultural diversity replaced the idea of progressive integration. The emergence of FPIC processes are in line with these developments.

In positive international law however, as was indicated above, this does not amount to a right to secession. The dominant view on indigenous peoples' right to self-determination is that it implies only internal self-determination, and that a right to independence is only allowed under exceptional circumstances, as an *ultimum remedium*. It is largely beyond the scope of this study to go into the question why indigenous peoples should or should not have secession rights.[170] Since informed consent procedures are applied between indigenous groups and other entities within states, the focus will be on self-determination within the framework of the state.

Regarding external self-determination, it is important to bear in mind that in general the international community discourages secession, on precepts of stability and peace, and balances self-determination against territorial integrity and state sovereignty. In the post-colonial era, the preferred course of action is to encourage the state to share power democratically with all groups or nations within its boundaries, under a constitutional formula that guarantees effective and genuine participation and representation.[171] The scope of this right to "internal" self-determination, which is arguably a confusing term, is assessed in light of the historical conception of self-determination mentioned in the former paragraphs. Taken together with contemporary interpretations, the ties between

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[169] The replacement of ILO Convention No. 107 by ILO Convention No. 169, which will be mentioned in the next paragraph, is highly illustrative of this changing perception on Indigenous Peoples protection.

[170] In this respect, *See* Driest S F Van den, *Remedial Secession, A Right to External Self-Determination as a Remedy to Serious Injustices* (School of Human Rights Research Series, Intersentia, 2013).

[171] Daes E I A, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination', Transnational Law and Contemporary Problems 1, 1993, page 8.

self-determination precepts and the principle of free, prior and informed consent, as enshrined in the UN Declaration on the Rights of Indigenous Peoples, will become clearer.

II.1.4.2 Interpretations of Indigenous Peoples' Right to Self-Determination

This paragraph will examine different interpretations and conceptualizations of the right to self-determination for indigenous peoples. Eventually, a model on indigenous self-determination will be presented that will also serve to clarify the notion of FPIC later on in this study.

One familiar line of argument, reasoning from a state-centered frame,[172] is that indigenous peoples possess elements of sovereignty predating the existence of the larger political order in which they live. Indigenous peoples are "peoples" subject to the right to self-determination, as explicitly stated in the UN Declaration. "Peoples" can be equated with "nations" whereas the difference between the two would be that "nations" also possess - some basic or more developed - governing structures. Indigenous peoples often retained their own systems of government and decision-making, which are usually quite distinct from the governmental system of the larger political order. In this light, since indigenous peoples are distinct cultural groups within states, all these states are multi-nation states.

In social contract theory, a nation's legitimacy is derived from a constitutive (hypothetical) moment, in which the nation is conceived with the consent of the governed. Indigenous peoples were excluded from this process as a rule. In other words, it is doubtful if the indigenous people concerned would have consented to inclusion into the larger political structure. Political values and systems foreign to them were often simply imposed on them, without their consent, and often through a practice of systemic inhumane treatment and forced assimilation. In general, indigenous peoples did not participate in state-building or shared in national decision-making.[173]

This line of reasoning forms a justification for granting indigenous peoples the right to self-determination. It does not reject the possibility that other sub-state groups could also have claims to the same right. However, the trend in international law and politics is that indigenous peoples are more likely candidates for being subjects of the right to self-determination.[174]

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172 Anaya S J, 'Superpower Attitudes Toward Indigenous Peoples and Group Rights', Am. Soc'y Int'l L. Proc. 93, 1999, p. 252. According to Anaya, the state-centered approach should be distinguished from the human rights approach. However, both lines of argumentation are instructive and since self-determination has, as this paragraph illustrates, always been a doctrine connected with statehood, these aspects need not to be ignored.

173 Daes E I A, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination', Transnational Law and Contemporary Problems 1, 1993, page 8.

174 I see no basis on which to reject a concept of internal self-determination for other minority groups. An examination on this issue unfortunately falls outside the scope of this work. James Anaya argues that what distinguishes indigenous peoples is the remedial aspect of self-determination. Indigenous peoples' substantive rights to self-determination, in Anaya's

Since the common opinion is that self-determination for indigenous peoples means "internal" self-determination,[175] an extra dimension of sovereignty, or perhaps better, autonomy, is created within the framework of the State for the new self-determining entity. Sovereignty, in this view, is no longer conceived in the absolute post Westphalian conception, but is a more dynamic notion applicable not only to the state. Other entities within the state itself (in this case indigenous) peoples may, to a certain extent, possess a form of sovereignty parallel to state sovereignty.[176] Later on in Part II we will examine a for indigenous peoples particularly important and controversial aspect of sovereignty, namely the principle of permanent sovereignty over natural resources, which is an important economic component of self-determination.

Internal self-determination for indigenous peoples is often equated with self-government, which again expresses the belief that government is to function according to the will of the people governed.[177] Self-determination in this sense is a democratic right. According to Thomas Franck, self-determination postulates the right of a people organized in an established territory[178] to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.[179] It has evolved into a more general notion of internationally validated political consultation.[180] This also illustrates that, as mentioned before, self-determination operates as a continuing or ongoing right instead of only legitimizing a constitutive moment.[181]

Arguments derived from state-centered and human rights based approaches dominate the debate on indigenous self-determination, and different authors have interpreted and elaborated on its content. One of the early key documents

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opinion, have been more systemically violated in the past. At present, indigenous peoples continue to be more vulnerable than other national groups. See: Anaya, 2004. See also: Kymlicka W, 'Theorizing Indigenous Rights', University of Toronto Law Journal 49, 1999. Also see Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007), where Kymlicka explains that arguments concerning national security presently prevent the recognition of rights to self-determination for other groups.

175 Anaya argues that: "The resistance towards acknowledging self-determination as implying rights for literally all peoples is founded on the misconception that Self-Determination in its fullest sense means a right to independent statehood." This misconception is often reinforced by reference to decolonization. Anaya, 2004, page 103.

176 Lenzerini F, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples', Texas International Law Journal 42, 2006-2007, p. 189.

177 Anaya, 2004, page 150.

178 Although a requirement of territory is contested, see Morag Goodwin, The Romani Claim to Non-territorial Nationhood, unpublished Ph.D. Thesis, 2006.

179 Franck T 'The Emerging Right to Democratic Governance' Am. J. Int'l L. 86, 1992., p. 52.

180 Ibid. p. 55.

181 In this context one could point to the referendums or plebiscites held in the decolonisation period, indicative of a constitutive moment in which Self-Determination is exercised as leading to the formation of a new independent State.

is former Chairperson and Special Rapporteur of the UN Working Group on Indigenous Populations, Erica-Irene A. Daes' 1993 paper.[182]

She asserts that it would be "inadmissible and discriminatory" to deny indigenous peoples the right to self-determination merely because they are indigenous. Besides the fact that this would imply that indigenous peoples would not have any rights to secession, this would mean that they are not in a position to demand full democratic partnership.[183] According to Daes, self-determination has taken on a new meaning in the post-colonial era. She considers:

> Ordinarily it is the right of the citizens of an existing independent state to share power democratically. However, a state may sometimes abuse this right of its citizens so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences.[184]

Daes does not rule out the possibility of a right to secession, but this is only an option in the most extreme cases. She continued:

> The international community discourages secession as a remedy for the abuses of fundamental rights, but as recent events around the world demonstrate, does not rule out this remedy completely in all cases. The preferred course of action, in every case but the most extreme, is to encourage the state in question to share power democratically with all groups, under a constitutional formula that guarantees that it is effectively representative.[185]

This articulation of self-determination seems to be the way the right is to be understood in the context of the UNDRIP. Daes argues that with some exceptions, indigenous peoples were never part of state-building, and did not have any opportunity to participate in the constitutional design of the states in which they live.[186] Indigenous peoples thus should be retroactively involved in the process of creating the institutions and governmental framework of the larger states in which they reside. In Daes' much cited words:

> With regard to indigenous peoples, then, I believe that the right of self-determination should ordinarily be interpreted as the right of these peoples to negotiate freely their political status and representation in the states in which they live. This process might best be described as a kind of belated state-building, through which

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[182] Daes E I A, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination', Transnational Law and Contemporary Problems 1, 1993. (Daes, 1993)
[183] Daes, 1993, p. 9.
[184] Daes, 1993, p. 8.
[185] Daes, 1993, p. 8.
[186] Daes, 1993, p. 8.

> indigenous peoples are able to join with all the other peoples that make up the state on mutually-agreed upon terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all other, but the recognition and incorporation of distinct peoples in the fabric of the state, on agreed terms.[187]

Daes combines lines of argumentation from both a statist and a human rights perspective to come to her understanding of indigenous self-determination. The "belated state-building" argument mentioned above denotes a form of retroactive consent to the governmental structures of the state in which indigenous peoples live. Daes' contractarian argument requires a re-negotiation of the arrangements (constitutional or other) between indigenous peoples and states. Further on in this study it is argued that FPIC is about building a framework in which such negotiations – between indigenous peoples and other entities, not just states – can be held.

James Anaya also refers to self-determination as foundational for the contemporary normative regime that concerns indigenous peoples.[188] He conceives of self-determination as a "universe of human rights precepts concerned broadly with all peoples, including indigenous peoples, grounded in the idea that all are equally entitled to control their own destinies."[189]

According to Anaya, self-determination is a human right, and should be interpreted together with other human rights norms. As a configurative principle, it is to be complemented by more specific human rights norms in forming a holistic framework for the governing institutional order.[190] The line taken in this study is that free, prior and informed consent is invaluable for the exercise of those other norms, especially those dealing with lands and resources.

The interpretation that self-determination is necessarily tied up with statehood should be abandoned to make place for a right to self-determination that is meaningful for indigenous peoples. Anaya described three types of dominant variants on the classic perspective on self-determination, all three of which are flawed.[191]

The misconception that is present in these variants is that they perceive the world as divided in mutually exclusive "sovereign" territorial communities. According to Anaya, this view is based on the Western theoretical perspective of an international legal space composed of individuals and states. This model

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[187] Daes, 1993, p. 9.
[188] Anaya 2004, p. 97.
[189] Anaya 2004, p. 98.
[190] Anaya 2004, p. 99.
[191] Anaya 2004, p. 100. The first variant holds that self-determination only applies to populations and territories under a situation of classical colonialism, the second states that peoples entitled to self-determination include the aggregate population of independent states and classical colonial territories, and the third variant perceives 'peoples' as those units that once were sovereign states or are entitled to be states.

ignores the "multiple overlapping spheres of community, authority and interdependency that actually exist in the human experience."[192] It is clear that Anaya emphasized that in the contemporary world, a conception of self-determination based on a division between individuals and states does not suffice, if it is to have real meaning for the multiple and overlapping spheres of human association that characterize humanity.[193]

Therefore, the ideal or principle of self-determination, which is based on precepts of equality and freedom, ought to concern the constitution and functioning of all levels and forms of government.[194] In Anaya's view, peoples should thus be understood to denote "all those spheres of community, marked by elements of identity and collective consciousness, within which people's lives unfold – independently of considerations of historical or postulated sovereignty."[195] Although Anaya rejected these attributes of sovereignty, their argumentative value is seen in this study as complementary to human rights based arguments, and considered instructive in clarifying the application of free, prior and informed consent.

Anaya's conceptualization of self-determination makes the concept applicable not only to whole populations of states and colonial peoples, but also to "other spheres of community that define human existence and place in the world."[196] This is in line with the view taken here that self-determination at its core is not concerned with independent statehood. For indigenous peoples, statehood is often not what they aspire, and this misconception about self-determination has frustrated constructive debate about what indigenous peoples understand by it and how it should be applied for and by them.

The substance of the norm of self-determination is to be distinguished from its remedial prescriptions.[197] Where the substantive content of the norm is applicable to all, the remedial prescriptions that follow from it differ and are necessarily only relevant to groups that have suffered from violation of substantive self-determination.[198] Anaya stated that substantive self-determination is build up out of two normative strains: first, its constitutive aspect, which holds that the governing institutional order is the outcome of processes guided by the will of the peoples, and secondly, an ongoing aspect, which requires that the governing order is one under which people live and develop their lives in freedom on an ongoing, continuous basis.[199] In positing this framework, Anaya rejected the internal/external dichotomy, which according to him is premised on the - rejected - view of a "limited universe of peoples comprising mutually exclusive spheres of community." As argued in this work, the internal/external

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[192] Anaya, 2004, p. 101.
[193] Anaya, 2004, p. 103.
[194] Anaya, 2004, p. 103.
[195] Anaya, 2004, p. 103.
[196] Anaya, 2004, p. 103.
[197] Anaya, 2004, p. 104.
[198] Anaya, 2004, p. 104.
[199] Anaya, 2004, p. 105.

distinction is confusing, since "internal" self-determination for indigenous peoples necessarily comprises both internal and external elements. Nevertheless, the terminology will be upheld, since it is also instructive in explaining the concept of free, prior and informed consent. Furthermore, in order for self-determination and FPIC to become workable concepts, a degree of categorization and delineation is needed.

Constitutive self-determination is linked with the provision's text that all peoples "freely determine their political status," thereby imposing variable standards of participation and consent that aim to guarantee that the political order reflects the will of the people or peoples concerned.[200] Ongoing self-determination is coupled with the phrase "freely pursue their economic, social, and cultural development." It thus requires a political order in which all are free to make meaningful decisions about their own paths and pace of development on a continuous basis.[201] Culturally differentiated groups, in exercising their ongoing right to self-determination, require a political order in which the group is able to retain its culturally distinct character, while at the same time having this character reflected in the governmental institutions.[202]

Anaya stressed that the remedial prescriptions, like secession in the colonial context, ought to be distinguished from its substantive groundings, where these prescriptions aim to remedy violations of the substantive right. The remedies may vary, and ought to be in accordance with the aspirations of the group concerned. For many indigenous peoples, Anaya agreed, secession may be a cure worse than the disease.[203]

Focusing on the variety of remedial measures that may be available seems an appropriate way to finding constructive solutions to the problems that many indigenous communities face.

Although this view is an attractive one, Will Kymlicka took a critical stance towards Anaya's theoretical exposition and claims that he leaves some fundamental questions unaddressed.[204] He stated that Anaya's claim that substantive self-determination is applicable to all groups, does not reflect international legal reality and that the remedial aspect of self-determination does not fit easily within a permanent "rights" framework, since remedies are of a more temporal nature.[205]

Kymlicka's main arguments centre on the difficult legal distinction between indigenous peoples and other minority groups. This distinction is difficult to uphold from a theoretical point of view, but is a factual reality in international conventions and documents. Kymlicka convincingly argued that the willingness

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[200] Anaya, 2004, p. 105.
[201] Anaya, 2004, p. 106.
[202] Anaya 2004, p. 106.
[203] Anaya 2004, p. 109.
[204] Kymlicka W, 'Theorizing Indigenous Rights', University of Toronto Law Journal 49, 1999.
[205] Kymlicka W, 'Theorizing Indigenous Rights', University of Toronto Law Journal 49, 1999.

to grant indigenous peoples a right to self-determination, where for national minorities this willingness is definitely absent, is based on security considerations, rather than on principled argument.[206]

Nevertheless, Anaya provided some compelling argumentation that self-determination for indigenous peoples is based on precepts of freedom and equality, and that the remedies for specific violations of substantive self-determination may vary. This way he emphasized that self-determination can be and should be exercised in different ways, certainly not only by independence. For indigenous peoples this is most often not what they aspire and the focus should be more on the arrangements between them and the governments of the states in which they live. The available and appropriate remedies (like forms of self-government, land and resource rights, and autonomy) are to be found in a fair process of negotiation. Anaya stresses that indigenous peoples have the same right to self-determination that all other peoples have, but it is in the remedies of violations of this right, that a diverging approach is discernible and appropriate.[207]

Anaya thus denoted self-determination as a human right and sees the reference to "peoples" as "designating rights that human beings hold and exercise collectively in relation to the bonds of community or solidarity that typify human existence."[208] As a human right, self-determination "cannot be viewed in isolation from other human rights norms but rather must be reconciled with and understood as part of the broader universe of values and prescriptions that constitute the modern human rights regime."[209] For Anaya, the essential content of self-determination, seen as a human right, is: "that human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly."[210] Anaya concluded:

> Self-determination is an animating force for efforts toward reconciliation — or, perhaps more accurately, conciliation — with

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[206] *Cf.* Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007). The discussion about the distinction between indigenous peoples and national minorities or other sub-state groups largely falls outside the scope of this study.

[207] Charters C and Stavenhagen R (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen 2009, document nr. 127), pp. 185 – 187.

[208] Charters C and Stavenhagen R (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen 2009, document nr. 127), pp. 185 – 187.

[209] Charters C and Stavenhagen R (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen 2009, document nr. 127), pp. 185 – 187.

[210] Charters C and Stavenhagen R (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen 2009, document nr. 127), pp. 185 – 187.

> peoples that have suffered oppression at the hands of others. Self-determination requires confronting and reversing the legacies of empire, discrimination, and cultural suffocation. It does not do so to condone vengefulness or spite for past evils, or to foster divisiveness but rather to build a social and political order based on relations of mutual understanding and respect.[211]

Benedict Kingsbury advocated another "participatory" approach to self-determination and although he takes a critical stance towards arguments reconciling the self-determination regime with the human rights discourse, his view is very much in line with the stance taken in this study.[212] Kingsbury's relational approach is instructive in explaining the linkages between indigenous self-determination and FPIC, since both concepts are participatory or cooperative in nature.

Describing the law of self-determination as a "conceptual morass" he rightly concedes that claims of indigenous peoples to self-determination require some rethinking of the traditional meaning of self-determination in international law.[213] If self-determination is to be an important tool for indigenous peoples, the "end-state" approach is to be abandoned and a relational one is to be acquired, since, as discussed earlier, most indigenous groups expect to continue an enduring relationship with the state(s) in which they reside.[214]

A relational approach may capture many of the aspirations indigenous peoples have and it is in line with the UNDRIP, which emphasizes that a spirit of cooperation and respect between indigenous peoples and states is to be promoted. Self-determination is about the relationship between host-state and communities, about legal principles concerned with creating, maintaining, or altering existing and enduring relationships between indigenous peoples and states.[215] As described in this study, informed consent processes are important tools to build and maintain such relationships.[216]

The UNDRIP specifies self-determination as entailing "self-government" and "autonomy" rights, but such rights are only to be acquired through a fair

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211 Charters C and Stavenhagen R (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen 2009, document nr. 127), p. 196.

212 Kingsbury B, 'Reconstructing self-determination: A relational approach', in: Aikio P and Scheinin M, *Operationalizing the right of indigenous peoples to self-determination* (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2000). (Kingsbury, 2000). Also see: Kingsbury B, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law', New York University Journal of International Law and Politics 34, 2001-2002.

213 Kingsbury, 2000, p. 21.

214 Kingsbury, 2000, p. 24.

215 Kingsbury, 2000, p. 27.

216 Or sometimes restrict them.

process of negotiation and participation.[217] The focus should thus be on the relations between the autonomous entities and their institutions. These relations require complex governance structures that may require the consent of all affected groups.[218]

Autonomy in this sense is not just "freedom" but concerns a complex and continuous relationship. Kingsbury's relational conceptualization of self-determination embodies the aspiration to define the relationship between indigenous communities and states. What is vital in establishing such relations is that a central focus is on the terms and dynamics of the relational aspects.[219]

This is a key point for this study: fair processes of communication and participation are the essential requirements for establishing arrangements between indigenous groups and other entities that can be characterized as "free." Autonomy is thus to be found *via* participatory processes, and it is such processes that require further attention, as this study aims to explain.

Kingsbury conceded that the relational approach to self-determination requires a crossing of boundaries between the self-determination and human rights discourses.[220] Both Daes and Anaya, albeit in different ways, acknowledged that self-determination for indigenous peoples should be understood from a human rights perspective. The UNDRIP supports this view, in posing self-determination as an umbrella right which is specified by the subsequent provisions.[221]

Kingsbury concluded that a relational perspective on self-determination may be the best one for progressing towards reaching global agreement on political and legal issues connected with indigenous peoples.[222]

Taking into account these views and more recent developments like the adoption of the UNDRIP, it is possible to come to an informative understanding of self-determination for indigenous peoples. The different interpretations have in common that self-determination is a *participatory* concept, which is in line with the principles underlying the UNDRIP.[223] One of the

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[217] United Nations Declaration on the Rights of Indigenous Peoples, *A/RES/61/295*, Article 4 and 5.

[218] Kingsbury, 2000, p. 28.

[219] Kingsbury, 2000, p. 29.

[220] Kingsbury, 2000, p. 34. Nevertheless, Kingsbury foresaw some difficulties in a fusion between self-determination doctrine and the human rights program. Hard cases may arise, in which self-determination and human rights paths lead in different directions.

[221] This is also the position Asbjørn Eide takes. Professor Eide is presently Senior Fellow and former Director at the Norwegian Center for Human Rights at the University of Oslo. He was a long-standing member of the United Nations Sub-Commission on the Protection and Promotion of Human Rights and the Chairman of its Working Group on Minorities.

[222] Kingsbury, 2000, p. 37. For a wider treatment on the different perspectives and justifications for a framework of international indigenous rights and a thorough analysis on how these may collide, see: Kingsbury B, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law', New York University Journal of International Law and Politics 34, 2001-2002.

[223] More recent publications confirm this view: see e.g. Quane H, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory

most important goals of the Declaration is to strengthen partnerships between indigenous peoples and states in a spirit of mutual respect and cooperation.[224] Just like self-determination, FPIC is also about building partnerships, about recognition and cooperation between entities that have decision-making powers in diverging areas. The following paragraphs will support this view. Although there can be conflicts between self-determination as a state-centered and as a human rights based concept, the view that is supported here is that both lines of reasoning are important and are reconcilable in an understanding of self-determination for indigenous peoples.

What is called internal self-determination for indigenous peoples vis-à-vis the state thus has to be a dual concept, aiming on the one hand at respect for autonomy and cultural integrity, and on the other hand at participation through democratic representation and inclusion in the larger political order in which the indigenous nation is situated.[225] As mentioned earlier, autonomy arrangements can only be achieved through a fair system of participation. Furthermore, participation and respect for autonomy are based on the precept that it truly is the indigenous people as a whole that is respected, represented, and entitled to equal participation.

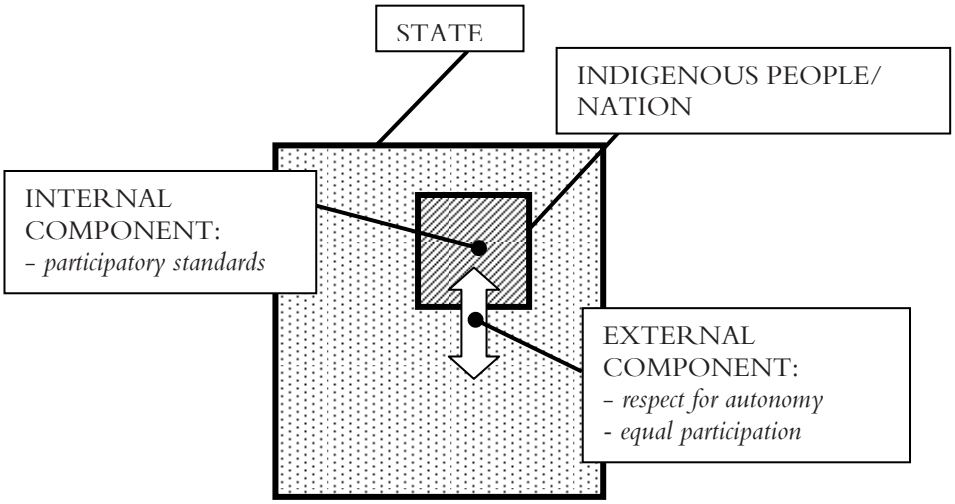
This implies that in order to adhere to these external norms, internal participatory standards are necessary. Here it becomes clear that "internal self-determination" is a confusing term in this context. Two dimensions in which internal self-determination operates are distinguished. First, in what will be called the "internal dimension", that is, within the indigenous group itself, and secondly, between the indigenous nation as a self-determining collective entity and the larger political order in which it is situated. Building on the previously outlined models, this places an indigenous people as a self-determining entity in a rather peculiar situation. Contrary to the ideal models of liberal, nationalist, and liberal nationalist self-determination, internal self-determination for indigenous peoples does not estimate congruence between the nation or people and the state. This said, internal self-determination for indigenous peoples, posed as an intra-state model of participation, could be presented as follows:

Rights', in: S Allen and A Xanthaki, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011).

[224] *See* Preamble to the UN Declaration on the Rights of Indigenous Peoples: "Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith."

[225] A concept referred to by Erica-Irene Daes as "Belated State-Building". See: Daes E I A, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination', Transnational Law and Contemporary Problems 1, 1993, page 9.

Figure 4: Internal Self-Determination for Indigenous Peoples.



This simplified model, on which of course countless variations are possible, illustrates the particularities that a right to self-determination for indigenous peoples entails. Moreover, as will be shown later on, this model will aid in getting a better insight into FPIC processes.

The most important way in which indigenous peoples can exercise their right to self-determination is through control over lands and resources. A key feature of this study is that FPIC cannot be detached from the right to self-determination and rights to lands and resources.

II.2 Self-Determination through Control over Land and Resources

Self-determination can be exercised in a number of ways, but for indigenous peoples the principle is directly related to their lands, territories and resources. As discussed above, it is through effective and equal participation that indigenous peoples may acquire such control. FPIC is becoming a central principle or tool to realize that indigenous peoples indeed have a say in decision-making processes concerning their lands and resources.

The following paragraph will provide a brief introduction into why land and resources are so fundamentally important for indigenous peoples. Since the remainder of this study, especially Part V, will elaborate upon land and resource rights in detail, an introduction about why they matter suffices here.[226]

[226] Especially the paragraph on the case law of amongst others the Inter-American Court of Human Rights will deal in detail with the current status of rights to land and natural resources.

II.2.1 Indigenous Peoples' Special Relation to their Lands

Self-determination through control over land is of primary importance to indigenous peoples for a number of reasons. Indigenous communities require land for their subsistence. Furthermore, they often have a special spiritual relation to their traditionally occupied territories. Land rights therefore are important to indigenous peoples' physical survival as well as their cultural survival.[227] This claim appears to require a large degree of control over decisions pertaining to these lands. This paragraph will briefly explain the special value of land for indigenous communities and will indicate some of the most common contemporary threats indigenous peoples face in relation to their lands.

In her seminal 2001 study, Erica-Irene Daes explained that the gradual deterioration of indigenous societies can be traced to the non-recognition of their lands, and to a lack of understanding of how profound the relationship of indigenous peoples with their lands is.[228] Colonization of indigenous peoples' territories affected them in a number of negative ways, as is well known. Daes mentions: maltreatment, enslavement, punishment for resistance, warfare, diseases and outright extermination as some of those effects. Indigenous populations in some areas declined with 95% and they were generally perceived as inferior or uncivilized beings with no rights to the lands they occupied. Doctrines of dispossession, mainly the discovery doctrine and the concept of terra nullius, were devised – in international law – to allow the colonizing powers to gain title to indigenous lands without having to pay any form of compensation.[229]

Contemporary issues frustrating indigenous land rights are unfortunately also numerous. In the name of national development, indigenous territories are expropriated and indigenous communities are often relocated and resettled. The integrity of the environment is often threatened by state supported projects and indigenous peoples often lack any form of legal protection. A number of cases in which these problems arose will be discussed in this study.

Already in the early eighties, José R. Martínez Cobo described the special relation indigenous peoples have to their lands in his groundbreaking and vast study on the problem of discrimination against indigenous populations. He stated: "It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture." Furthermore:

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[227] This will be discussed further in Part V.

[228] E/CN.4/Sub.2/2001/21, Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Indigenous Peoples and their Relationship to Land, Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes, Commission on Human Rights, 11 June 2001, p. 9.

[229] Remarkably, the invalidity of the concept of terra nullius was asserted by the High Court of Australia as late as 1992, in the famous Mabo II case. High Court of Australia, Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).

> For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.[230]

Later on in this study, when a number of landmark cases dealing with indigenous peoples before the Inter-American Court of Human Rights will be discussed, a closer examination of this special relation to land will be provided.

An important point that Daes makes is that while there may be some degree of recognition of land rights available, real control by means of having a say in decision-making concerning development, use of natural resources, management, and conservation measures, is often absent. This is necessary for indigenous peoples to exercise their right to self-determination and as the topic of this study suggests, FPIC processes are instruments that help to realize such control.

In sum, one central claim that indigenous peoples make in international law is the claim to control and own their territories. Jérémie Gilbert elaborates: "Even though indigenous peoples reflect the tremendous diversity of the world, living in some of the most remote parts of the globe, it is striking to realize how they all share the same attachment to their lands, which plays a central cultural, social and economic role within indigenous societies globally."[231] In this light, the preamble to the UNDRIP states:

> Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.[232]

The claim to control over lands is essentially also a claim to property. Nevertheless, indigenous and western conceptions of property may differ substantially, and ownership of the land in indigenous societies is often not centered on the individual, but is held by the community collectively. Interpretations of the human right to property, expanding it to include collective property rights for indigenous peoples over their lands, will be one of the central topics of Part V.

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[230] José Martinéz Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations,* United Nations publication, sales No. E/86/XIV/3, paragraphs 196 and 197.

[231] Gilbert J, *Indigenous Peoples' Land Rights under International Law, From Victims to Actors* (Transnational Publishers, 2008), p. xiv.

[232] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), A/RES/61/295, adopted by the General Assembly on Thursday September 13 2007.

This connection between the human right to property and protection of indigenous peoples' lands was first recognized in the milestone Awas Tingni v. Nicaragua case in which the Inter-American Court of Human Rights decided that the right to property includes a right for indigenous peoples to collective land ownership. In particular, this right is perceived as important to guarantee the continuing physical and cultural survival of indigenous communities in light of the special spiritual relation that indigenous peoples have with their lands, to accommodate different perceptions on the concept of property or ownership, and to guarantee indigenous peoples their means of subsistence and the protection of their environments. The related concept of native title to indigenous peoples' lands has also been recognized by other - regional and national - judicial bodies.[233] It is vital to understand that indigenous perspectives on land and property can differ substantially from other ideas about private property.[234] Current developments in international law recognize that indigenous peoples require collective land rights in order to protect their livelihoods.[235] These developments will be examined closely later on and it will be illustrated that FPIC plays a pivotal role in respecting these rights.

Indigenous peoples' rights to land may have to include – to some extent – their right to utilize the natural resources that can be found there. Nevertheless, there is still a lot of discussion about to what extent indigenous peoples should also be allowed to manage and exploit the natural resources found on their lands and territories.

II.2.2 Sovereignty over Natural Resources

As discussed above, Special Rapporteur Erica-Irene Daes asserted that indigenous peoples have the right to the recognition of their property and

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233 See, High Court of Australia, Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992). Also see, Supreme Court of Canada, Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010. Later on in this study, the concept of native or aboriginal title in Malaysia will also be discussed when examining the situation of the Orang Asli People of the Malaysian Peninsula.

234 Erica-Irene A. Daes, Indigenous peoples and their relationship to land, E/CN.4/Sub.2/2001/21, 2001.

235 See, IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79. Also see, IACtHR, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124. (2005). Also see, IACtHR, Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, Int.-Am. Ct. H.R., (Ser. C), No. 146. Also see, IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007). A more recent case before the African Commission on Human and Peoples' Rights confirmed similar applicability in the African context. African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010.

ownership rights with respect to lands.[236] In a 2004 study, Daes reiterated that there is a growing trend in international law to extend the concept and principle of self-determination to peoples and groups within states. Daes concluded that in order for this to be meaningful for indigenous peoples, it must logically and legally carry with it the essential right of permanent sovereignty over natural resources.[237] She suggested that international law has now reached the point where it recognizes this right for indigenous peoples. Daes articulated this right as: "a collective right by virtue of which the State is obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources."[238]

However, indigenous sovereignty, as was noted earlier, remains a highly controversial concept in contemporary international law, since the doctrine remains primarily attached to statehood or the whole population (people) of a State.[239] Absolute sovereignty implies the need for full consent (in international law, the consent to be bound), but absolute state sovereignty is nowadays a fiction.

James Tully, whose work will be discussed extensively later on, explains that absolute sovereignty, as a single locus of power is a false depiction of sovereignty today. This is so because the exercise of political power is dependent on and limited by the consent of the people, by all sorts of international relations and divided among a diverse number of representative bodies.[240] This non-absolute sovereignty could be defined as the authority of a culturally diverse people or association of peoples to govern themselves by their own laws and ways free from external subordination.[241] Similarly, indigenous peoples' sovereignty could be understood to entail a more moderate, shared or parallel form, that aims to

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236 Erica-Irene A. Daes, Indigenous peoples and their relationship to land, E/CN.4/Sub.2/2001/21, 2001. Also see, Daes E I A, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination', Transnational Law and Contemporary Problems 1, 1993.

237 Erica-Irene A. Daes, Indigenous peoples' permanent sovereignty over natural resources, E/CN.4/Sub.2/2004/30, 2004.

238 Erica-Irene A. Daes,'Indigenous peoples' permanent sovereignty over natural resources' (2004), para. 40.

239 *Cf.* e.g., Lenzerini F, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples', Texas International Law Journal 42, 2006-2007. Also see, Wiessner S, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples', 41 Vanderbilt Journal of Transnational Law, 2008. Also see, Anaya S J, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of what Rights Indigenous Peoples have in Lands and Resources', Arizona Journal of International and Comparative Law 22, 2005.

240 Tully J, *Strange Multiplicity, Constitutionalism in an Age of Diversit* (Cambridge University Press, 1995), p. 194.

241 Tully J, *Strange Multiplicity, Constitutionalism in an Age of Diversit* (Cambridge University Press, 1995), p. 194.

include indigenous peoples equitably in the democratic decision making processes of the state.[242]

Without any doubt, it is necessary for indigenous peoples to control their natural resources to a large extent, but applying Daes' progressive interpretation of the principle of permanent sovereignty over natural resources, remains controversial. Nigel Banks explains: "The extent to which indigenous peoples may also be beneficiaries to the doctrine of permanent sovereignty is contentious, since that doctrine explicitly makes use of the language of sovereignty, language that has typically been reserved by states for their own use."[243]

Nico Schrijver, leading expert on sovereignty over natural resources also takes a more modest position although he acknowledges that indigenous peoples' claims to natural resources may require more participatory approaches to resource management. Schrijver also states that resource management will have to go hand in hand with protection of the ecosystem.[244] As will be pointed out in Part V, this is indeed the direction that sustainable development is taking; there is an increased attention for FPIC in this field.

As Daes explained, indigenous peoples suffer from unfair and unequal economic arrangements. The natural resources that originally belonged to them where in most cases not freely and fairly given up and there is a need to level the economic and political playing field and protect indigenous peoples against unfair and oppressive economic decisions.[245]

Daes concluded that:

> The right of permanent sovereignty over natural resources is critical to the future well-being, the alleviation of poverty, the physical and cultural survival, and the social and economic development of indigenous peoples. Indigenous peoples, if deprived of the natural

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242 The debate is vast and largely falls outside the scope of this study. *See* e.g. Wiessner S, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples', 41 Vanderbilt Journal of Transnational Law, 2008. Also see: Lenzerini F, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples', Texas International Law Journal 42, 2006–2007. *Also see*: Schrijver N, *Sovereignty over Natural Resources, Balancing Rights and Duties* (Cambridge University Press, 1997). Also see: Schrijver N, 'Unraveling State Sovereignty?, The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources', in: *Changing Perceptions of Sovereignty and Human Rights, Essays in Honour of Cees Flinterman* (Intersentia 2008).

243 Bankes N, 'International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples', 47, Alberta Law Review, 2010, p. 477.

244 See Professor Schrijver's recent reflections on the current status of sovereignty over natural resources: Permanent Sovereignty and the Balance of Rights and Duties, Prof. Dr.Nico Schrijver, Leiden, International Conference on Permanent Sovereignty over Natural Resources - Development of a Public international Law Principle and Its Limits on 29 and 30 January 2013 at Haus Patmos in Siegen. The full lecture is available at: http://www.youtube.com/watch?v=dPzvQw4ecwM.

245 Erica-Irene A. Daes, Indigenous peoples' permanent sovereignty over natural resources, E/CN.4/Sub.2/2004/30, 2004, paragraph 32.

> resources pertaining to their lands and territories, would be deprived of meaningful economic and political self-determination, self-development, and, in many situations, would be effectively deprived of their cultures and the enjoyment of other human rights by reason of extreme poverty and lack of access to their means of subsistence.[246]

Although it can be concluded that control over natural resources is essential for indigenous peoples, it can also be said that linking up resources with doctrines on sovereignty makes it highly controversial in international law. Extending the principle of permanent sovereignty over natural resources to indigenous peoples remains contested, but if we rephrase Daes' argument a bit, it is certainly fair to say that political self-determination would be pointless for indigenous peoples if it did not include a form of economic self-determination, that is having a say – to a certain extent – over natural resources.

II.3 Conclusion: Self-Determination for Indigenous Peoples: Autonomy, Participation and Control over Lands and Resources

In summary, a historical account has been provided to illustrate the complexities surrounding the right to self-determination and to indicate that it is an evolving concept that is adaptable to contemporary societal issues, needs, and ideologies. Throughout its history, self-determination evolved from a political principle into a genuine legal standard within contemporary international law. [247] Its basic premises are deeply entrenched in the liberal democratic conviction that government should be legitimized by the consent of the governed people. Furthermore, nationalist perceptions – that nations and peoples ought to be self-governing – shaped its content. Self-determination is at its core a democratic entitlement that calls for consent and free expression of the will of "a people."

Until the adoption of the UNDRIP, self-determination did not emerge within international law as a right for indigenous peoples. In contemporary international law, however, a slow but certain move away from the state-

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[246] Erica-Irene A. Daes, Indigenous peoples' permanent sovereignty over natural resources, E/CN.4/Sub.2/2004/30, 2004, paragraphs 57-58.

[247] Scholars also argue that Self-Determination has emerged toward a norm of Ius Cogens, a Peremptory Standard of International Law entailing Erga Omnes obligations. On this subject see: Summers, 2007, Chapter 5, pp. 387-397. Also see: Cassese, 1996, pp. 169-174. Also see: Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 S.C.R. 217. In this case the Supreme Court noted that Self-Determination has acquired a status beyond convention and is considered a general principle of international law. On the Erga Omnes character of the principle of Self-Determination also see: International Court of Justice, East-Timor (Portugal v. Australia), judgment 30.06.1995, ICJ, Reports 1995, 90 & I.C.J. Advisory opinions on Namibia (1971) and Western Sahara (1975). The Erga Omnes character was reaffirmed bij the ICJ in: Legal consequences of the construction of a wall in the occupied palestinian territory, advisory opinion of 9 july 2004, paragraph 88 ff. In general see: Cassese, 1996.

centered Post-Westphalian model can be distinguished. For indigenous peoples, self-determination at least entails the right to internal self-determination, which is best conceived as a participatory model that aims to secure respectful cooperation and equal participation. Self-determination lies at the heart of indigenous peoples' protection, by itself and by granting legitimacy to the other provisions in the UNDRIP. It serves as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their future.[248]

The provisions in the UNDRIP are a first step in according indigenous peoples substantive rights of autonomy and self-determination that work within the framework of the state.[249] Since indigenous peoples, as collective entities, are included in the framework of the state, or any other larger political order, there are two spheres or dimensions that need to be distinguished; internally, within the indigenous nation itself and externally, between the indigenous nation as a collective entity and the larger political order in which it is situated. These dimensions are necessarily at least partially overlapping and interwoven.

One set of legal arguments assumes that indigenous peoples should exercise self-determination since they possess attributes of sovereignty that pre-date and parallel state sovereignty. A complementary set of arguments is articulated within a human rights frame, which emphasizes that self-determination is essentially a human right – an umbrella right – needed for the protection of often vulnerable indigenous communities.[250] Although both lines of argument are important, within international law a human rights based approach is becoming the more important one, and is often the one with the best prospects for effective protection of indigenous peoples.[251] Both lines confront public international law with some of its defects, and challenge it to overcome these.

Internal self-determination for indigenous peoples appears to entail at least a right to autonomy; i.e. the possession of separate and distinct administrative structures and judicial systems, determined by and intrinsic to the people or community concerned.[252] However, for autonomy-arrangements to become real, this should include the possibility for indigenous peoples to participate, in a position of equality, in the decision-making procedures of the state.[253] Internal self-determination, in its external conception is therefore a dual right, aiming at

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248 José Martinéz Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8, page 74, at 580.

249 See also: Kymlicka W, 'Theorizing Indigenous Rights', University of Toronto Law Journal 49, 1999, p. 285.

250 Anaya S J, 'Superpower Attitudes Toward Indigenous Peoples and Group Rights', Am. Soc'y Int'l L. Proc. 93, 1999, p. 252.

251 As will be illustrated in the examination of case-law from different human rights bodies.

252 This description is derived from: José Martinéz Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8, page 53, at 272.

253 *Also see*: Knop K, *Diversity and Self-Determination in International Law* (Cambridge University Press, 2002), p. 263.

autonomy on the one hand and participation in the larger political order on the other. Internally, it requires fair participatory standard in line with internationally recognized human rights.

Self-determination for indigenous peoples requires control over their lands and resources. Indigenous peoples not only require protection of their lands and resources for their subsistence, but also have a special spiritual and cultural attachment to their lands.

This way, self-determination for indigenous peoples has important *political*, *cultural* and *economic* elements. In part III and V of this study, these elements will be examined in more detail. In the paragraph on freedom, it will be exposed that the political element of self-determination can be respected by providing indigenous peoples with a large degree of discursive control in decision-making processes that affect them. It will be illustrated that the political ideal of non-domination is to be upheld to give indigenous peoples a fair say in political processes. In relation to the cultural dimension of self-determination, it will be explained what kind of intercultural dialogue is needed for accommodating indigenous peoples' claims in multi-nation states. Regarding the economic dimension of self-determination, the international and regional legal systems on land and resource rights will be examined in detail.[254]

The right to self-determination for indigenous peoples – in most cases – does not amount to a right to full independence. Similarly, rights to lands and resources are not absolute and may be restricted under certain circumstances. In the same way, we will see that FPIC is not an absolute right, but that its scope is determined by the nature of the rights involved and the impact a proposed decision may have on those.

Although the different views on self-determination examined above diverge to some degree, they have in common that they stress the participatory nature of self-determination for indigenous peoples. Self-determination for indigenous peoples should be understood as types and degrees of participation and autonomy based on the ideals of freedom and equality.[255] This is in line with the spirit of the UNDRIP. Through its framework of substantive and participatory rights, the Declaration indicates how indigenous peoples can exercise their right to self-determination.

As will be illustrated, within the context of the UNDRIP, free, prior and informed consent is the most far-reaching of these participatory provisions and it is becoming one of the central principles for protecting indigenous rights worldwide. It is argued in this study that FPIC is the most practical expression of - and one of the most important tools to realize - self-determination. For indigenous peoples self-determination expresses their fundamental desire to choose their own pace and path of development. Part III of this study will

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[254] These cultural, political and economic elements are intertwined and overlapping.

[255] *Cf.* Goodwin M, *The Romani Claim to Non-territorial Nationhood* (unpublished Ph.D. Thesis, 2006).

therefore examine these participatory norms – primarily effective participation and free, prior and informed consent – from a number of perspectives.

III. PROCEDURES

Having dealt with the substantive issues underlying the need for FPIC and participation rights: indigenous peoples' claim to self-determination, with its political, cultural and economic elements, and the related claims to rights over land and resources, it is now time to turn to the procedural part of this study. Procedural tools and mechanisms are invaluable in establishing agreement on the substantive rights involved and facilitate their implementation.

This part will explore the – primarily international – procedural or participatory framework that is emerging for indigenous peoples. This framework of "effective participation" will be examined and it will be argued that free, prior and informed consent is an important principle for qualifying how such effective participation processes ought to be structured. In other words, effective participation of indigenous peoples in decision-making processes of their concern is vital to ensure substantive equality and FPIC spells out the basic criteria for such processes. The FPIC principle bears on both the process that is to be followed and the desired outcome of such processes.

Nevertheless, there are a number of problems and misconceptions related to FPIC, and therefore this part will also "dissect" free, prior and informed consent and offer a critical examination of its different elements.

It is often emphasized that effective participation and the related principle of FPIC should be the norm, but without proper explanations about what these key-concepts amount to. Obviously, participation and FPIC processes should be tailored to specific situations and cultural contexts, but that does not mean that some general observations and insights cannot be found. Examining the significance and substance of effective participation and FPIC is therefore the main task of this part.

This part will expose that FPIC should not be perceived as a stand-alone concept or right, but that it should include a system of fair and effective participation seen in tandem with the substantive rights at stake. The system is described in terms of the norms that exist and in terms of their justifications.

Finally, this in this part we will aim to reveal why "consent" requires strong additional requirement for securing its validity, and will describe what these requirements are. Any FPIC process should include effective participation and consultation, but what is meant by effective participation, and what is the relation between "effective participation" and "free, prior and informed consent?" Both participatory standards emerge in the context of the international protection of indigenous peoples. In this part we will analyze what kind of procedures are desired to facilitate implementation of the substantive principles treated in Part II. It will be argued that recognition, dialogue and cooperation on a basis of equality are the goals of any given FPIC process.

III.1 Introduction: Participatory Norms for Indigenous Peoples

International standards and processes in relation to indigenous peoples increasingly rely on and require the full participation of indigenous peoples themselves; the system of protection is no longer "about them, without them." Indigenous peoples, mainly thanks to their own efforts, are no longer merely victims, or objects of protection, but are emerging as full actors, legal subjects in the international arena.[256] And FPIC is rapidly becoming *the* concept that embodies this movement and its related claims.[257] To get to a proper understanding of FPIC, it is necessary to explore the underlying framework of participatory norms, standards, and their justifications.

These contemporary norms reflect the move from non-discrimination and integration towards self-determination and participation of indigenous peoples as distinct cultural collectives in broader society. The replacement of ILO Convention 107 by Convention No. 169 illustrates the shift in thinking about indigenous peoples. Participatory frameworks are seen in this study as key to the implementation of substantive indigenous rights to self-determination, lands and resources. Two core concepts are studied in this part: *Effective participation* and free, prior and informed consent. The right to effective participation is posited as the general framework and *FPIC* as the central principle qualifying the requirements for effective participation.

Besides explaining the central place that effective participation and FPIC take in the discourse on the international protection of indigenous peoples, a number of authoritative perspectives on both concepts will be explored.

The paragraphs in Part III are structured as follows:

III.2 Effective Participation

This paragraph will trace the development of ideas and norms pertaining to the equal participation of minority and indigenous groups. In line with what was argued in the paragraphs on self-determination, effective participation is seen as the basic norm for relations between indigenous peoples and states. The concept of "effective participation" was devised within the framework of the High Commissioner on National Minorities in the context of the European minority protection regime. Effective participation was meant to avoid the connotations

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256 See e.g. Meijkecht A, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia – Hart, Antwerpen – Groningen – Oxford, 2001). Gilbert J, *Indigenous Peoples' Land Rights under International Law, From Victims to Actors* (Transnational Publishers, 2008).

257 Free, prior and informed consent is seen by indigenous peoples as one of the most important principles to protect their right to effective participation: *See* Final study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/EMRIP/2011/2, 26 May 2011, p. 13.

of national self-determination that were unacceptable for states.[258] However, the concept is vague and subject to multiple and conflicting interpretations. More recently, it is observed in a number of studies that a "right to effective participation" is becoming a central idea in the discussions about the international protection of indigenous peoples.

III.2.3 The United Nations System: The Right to Effective Participation as a General Framework for Indigenous Peoples

This paragraph will provide a description of the existing framework in the different instruments that exist for indigenous peoples. Most prominently, the participatory framework of the UN Declaration will be examined, in order to find out what kind of procedural standards there are, and to clearly illustrate the place of FPIC within this frame.

III.2.4 Participation: James Tully and the Preconditions for an Intercultural Dialogue

Since situations of indigenous self-determination, in which participatory norms and FPIC are relevant, are always intra-state situations, James Tully's theory which he developed in "Strange Multiplicity" was used to get to an understanding about how such an intercultural dialogue should take place. Tully described how a constructive intercultural dialogue between different political entities in the same state could be made possible. Moreover, he provided a framework for interaction between different "peoples" or "nations" within the same state. Such interaction should be based on three conventions, namely: mutual recognition, consent, and continuity.

III.3 Free, Prior and Informed Consent

As illustrated in the preceding sections, FPIC is emerging as one of most important participatory norms for indigenous peoples. However, the scope and content of this claim are unclear, which hampers its effective implementation. The following paragraphs will try to analyze the different elements of "free, prior and informed consent" in order to clarify its meaning.

III.3.1 Free: Discursive Control and Non-Domination

The following paragraphs will take Philip Pettit's "Theory of Freedom" to gain insights into what is meant by "free" consent, in other words; what is meant when it is said that an indigenous people acts in a capacity that is depicted as "free." Both personal freedom, entailing the area of free will, and political freedom are covered by Pettit's account. Pettit's freedom theory is very well

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[258] Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007), p. 239.

suited to explain the connotations of "free" in FPIC, since he reasoned that freedom has an interpersonal dimension and FPIC processes of course always take place *between* different actors.

III.3.1.1 Personal Freedom and Consent: Discursive Control

This paragraph will elaborate on what is meant by stating that indigenous peoples should give their consent in a way that can be described as "free." It will explain which requirements must be met to speak of "free consent." Moreover, Pettit's account explains how freedom in FPIC processes can be described without leaving room for - hostile forms of - coercion.[259]

III.3.1.2 Political Freedom and Self-Determination: Non-Domination

This part will examine which political principle is most suitable to preserve or guarantee the political freedom of an indigenous group. It will be observed that non-domination should be the guiding principle in participatory processes like FPIC and in all relations or decision-making processes between indigenous peoples and the state. Since claims to self-determination and FPIC are not only of a legal, but also political nature, it is important to investigate questions on political freedom.[260]

III.3.2 Prior: Ex-Ante Contestation and Ex-Post Revision

It seems logical that consent has to be obtained prior to the commencement of certain intrusive activities. Nevertheless, perceived as a contestatory right, FPIC is not only relevant before any projects take place, but may also have to entail standards for revision and evaluating existing arrangements. An important argument in line with what is stated about effective participation is that FPIC includes an element of continuity, and perhaps should not always be seen as a process with a definite beginning and end.

III.3.3 Information and Communication

This part will describe that it is not just the transfer and disclosure of information that is important for FPIC, but also, or maybe primarily, the way in which the communicative process takes place.

The concept of "informed consent" was devised after the Second World War, in the context of medical research and practice. Within the field of "bioethics" there is a large debate on the meaning, relevance and justification of

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[259] As already described early in this study, an important element of *free* consent, is the absence of coercion.

[260] The political nature of self-determination for indigenous peoples was subject to elaborate examination in part II of this study.

informed consent requirements. This debate is highly instructive for clarifying FPIC for indigenous peoples.

III.3.4 FPIC: Participation, Representation and Consent

When "consent" is given or withheld, it necessarily involves an act of representation on behalf of the community or people involved. Representation is one of the most important and difficult elements of an FPIC process. A number of problems could arise in this respect. The central question in this paragraph is: What are the particular difficulties related to consulting or obtaining consent from an indigenous people? For instance, problems might occur in connection to territorial or social overlap, urban areas, communities living in (partial) voluntary isolation, or with regard to possible "illiberal practices" – that might conflict with human rights standards – within communities; e.g. in relation to women's or youth participation. Consent may also be misused, manufactured, or obtained "pro forma." Different issues related to "external" and "internal" participation are discussed.

III.4 Effective Participation for Indigenous Peoples: Dialogue, Communication and Consent in Multi-Nation States

This paragraph will combine the findings of part III in some general conclusions. In part V, these findings will be tested in a number of cases and examples that are discussed.

III.2 Effective Participation

III.2.1 Effective Participation for Minorities and Indigenous Peoples

It is widely recognized that for minorities and indigenous peoples effective participation in decision-making processes that may affect them will lead to better, more representative protection.[261] In a way, this is what self-determination amounts to. In order to better understand FPIC and its implications, its associated framework of "effective participation" needs to be explained first.

The right to effective political participation is recognized as a general human right in the main international and regional human rights instruments.[262] For

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[261] Both ILO Convention No. 169 and the UNDRIP are based on principles of participation and consultation.

[262] See e.g. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Article 25. International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106, (XX) of 21 December 1965, entry into force 4 January 1969, Article 5(c). Protocol 1 to the European Convention on Human Rights, Article 3. American

minorities and indigenous peoples this right may take a number of different forms, including special representation rights at the institutional level and, for our purposes most important, the right to participate in decision-making processes that may affect them.[263]

On the international level, the Human Rights Committee made some important decisions. The HRC observed in the Apirana Case, recalling its general comment on Article 27 of the ICCPR, that: "Especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them."[264] An active duty for the state to consult indigenous peoples is similarly observed in the two well-known "Länsman" cases before the Committee concerning alleged violations of Saami cultural rights under Article 27.[265] In Part IV, further statements of the HRC on indigenous participation rights and FPIC will be examined.

As discussed above, ILO Convention No. 169 also emphasizes that consultation and participation of indigenous peoples in decision-making procedures is essential. Where ILO Convention No. 107 still focused more on non-discrimination and progressive integration of indigenous people into the majority culture, ILO 169 represents a change in commitment, influenced by indigenous peoples themselves, towards self-determination, equal participation, and cultural integrity.[266]

On the regional level, the developments within the Inter-American Human Rights System, foremost in the judgments and decisions of the Court and Commission respectively, indicate the need for effective mechanisms for the participation of indigenous peoples and point out the necessity to consult

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Convention on Human Rights, Article 23. African Convention on Human and Peoples' Rights, Article 13.

[263] Barelli M, Guliyeva G, Errico S and Pentassuglia G, 'Minority groups and litigation: A review of developments in international and regional jurisprudence', Minority Rights Group International, 2011, p. 24.

[264] HRC, Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000). In: Alcidia Moucheboeuf, Minority Rights Jurisprudence, Council of Europe Publishing, 2006, Belgium, pp. 262-263. Also See: General Comment No. 23: The rights of minorities (Art. 27),. 08-04-1994.
CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments), paragraph 7: With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of

[265] HRC, Länsman et al. v. Finland, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994). & Jouni Länsman et al. v. Finland, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996).

[266] Anaya, 2004.

indigenous peoples in relation to decisions that affect them through to culturally appropriate processes.[267]

Participation of indigenous peoples is also widely recognized as fundamental in an international and regional context. Like in the case of the UNDRIP, indigenous peoples actively participated in the drafting process that led to the Proposed American Declaration on the Rights of Indigenous Peoples.[268]

In spite of some controversy over the use of the term "indigenous peoples" in the African context, the African Commission on Human and Peoples' Rights has called for respect for the right to free participation in government and the right to self-determination.[269] After some debate,[270] none of the African states voted against the Declaration, which is in line with the African Commission's view on indigenous peoples.[271]

The African Charter on Human and Peoples' Rights codifies particular rights of peoples to non-domination, self-determination, wealth and resources and economic, social and cultural development.[272] These collective rights, formulated as rights of "peoples," should be available to sections of populations within nation states, including indigenous peoples and communities.[273] Moreover, the African Commission has elaborated on these rights and the need for non-dominated equal participation in a number of reports and decisions.[274]

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267 The Inter American Court and Commission's jurisprudence will be examined in-depth in part V of this study.

268 Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session, OEA/Ser/L/V/.II.95 Doc.6 (1997).

269 See, *Resolution on Nigeria*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, ACHPR/RP/8th , Annex VII, quoted by Murray, unpublished. In: *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities,* Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa," Adopted by The African Commission on Human and Peoples' Rights at its 28th ordinary session, 2005.

270 See, Genugten W J M van, The African Move towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments behind the Procedures, Draft, 28 January 2008. Also see: Genugten, W. v. (2010). "*Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems.*" Am. J. Int'l L.,104(1).

271 African Commission on Human and Peoples' Rights, Communique on the UN Declaration on the Rights of Indigenous Peoples, Brazzaville, 28 November 2007.

272 African (Banjul) Charter on Human and Peoples' Rights, Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force, October 21, 1986. Articles 19-24.

273 *Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities*, Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa" Adopted by The African Commission on Human and Peoples' Rights at its 28th ordinary session, 2005.

274 See e.g., African Commission on Human and Peoples' Rights, Malawi African Association and Others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, 2000. Also see, African Commission on Human and Peoples' Rights, The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria,

International and regional documents and cases progressively stress the importance of effective participation for indigenous peoples. But the concept was devised within the framework of the High Commissioner on National Minorities, in the context of the European minority protection regime.[275]

According to Will Kymlicka, effective participation was meant to avoid the connotations of national self-determination, which states would consider unacceptable[276] Patrick Thornberry argues in favor of group differentiated participatory rights in stating that: "The principle of participation in decision-making by persons belonging to minorities looks beyond a 'neutral' public realm, dedicated to abstract decision-making for the benefit of an undifferentiated citizenry."[277] But still, the concept is vague and subject to multiple and conflicting interpretations.[278]

Kymlicka exposes a range of meanings of effective participation, between a minimal right to non-discrimination and voting, to a more robust reading that requires forms of representation in the legislature.[279] Taken literally, effective participation seems to mean that participation should have "effect," a real impact on the outcome of decision-making.

Such a maximalist reading, which requires counter-majoritarian forms of power-sharing, is obviously the reading that many minorities endorse, but it is strongly opposed by most states - who further a more moderate account - for exactly the same reason that ideas of self-determination - and in the context of indigenous peoples, a requirement of consent - are resisted.[280]

So according to Kymlicka, agreement on a right to effective participation has been possible precisely because it has been interpreted as an alternative to, not a vehicle for, minority self-government.[281] The UN Minority Rights Declaration[282] includes broad notions of participation and Article 15 of the

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Comm. No. 155/96, 2001. Also see, Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana.

275 See e.g. The Lund *Recommendations on the Effective Participation of National Minorities in Public Life*, OSCE High Commissioner on National Minorities 1999.

276 Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007), p. 239.

277 Thornberry P, 'Minority and indigenous rights at the end of history', 2 Ethnicities, 2002, p. 526.

278 *Ibid*. (This part of the study argues that FPIC assists in providing more clarity about the content of a right to effective participation.)

279 Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007), p. 240.

280 Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007), p. 241.

281 Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007), p. 242.

282 UN Declaration On the Rights of Persons Belonging to National or Ethnic, Religous and Linguistic Minorities, Adopted by General Assembly Resolution 47/135 Of 18 December 1992.

Council of Europe Framework Convention provides that parties "shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, particularly those affecting them."[283]

According to Thornberry, this emphasis on effective participation is a strong indication that minority involvement in decision-making is a legitimate demand. These international norms on participation do not specify precise modalities and do not aim to "model" national approaches.[284] As will be illustrated throughout this study, searching for a single procedure for effective participation and FPIC is similarly neither feasible nor desirable.[285]

However, participation is a key aspect of the contemporary politics of recognition and not confined to the political sphere but implicates wide areas of social and public life.[286] So, although the concept is ambiguous and Kymlicka fears that a right to effective participation may in the end reproduce rather than resolve the problems faced by minorities, he contends that "effective participation is becoming a new and important site for playing out the tensions between short-term security and long-term justice" although it does not by itself provide a formula for resolving those problems.[287]

In the context of indigenous peoples, there is more support for a self-government norm and more robust forms of participation.[288] Effective participation seems to be an important concept, but it is in itself not clear enough to meet indigenous peoples' demands. Effective participation nevertheless provides a framework for any FPIC process,[289] but its content and relation to FPIC is underexposed. An important argument in the following paragraphs is that FPIC is a central principle that qualifies and gives substance to the "vaguer" norm or right to effective participation. FPIC provides the right to

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283 Council of Europe, Framework Convention for the Protection of National Minorities, Strasbourg, 1.II.1995, European Treaty Series - No. 157.

284 Thornberry P, 'Minority and indigenous rights at the end of history', 2 Ethnicities, 2002, p. 525.

285 The Lund Recommendations elaborate on this point in observing that specific arrangements are often necessary for effective participation and that it moves along with principles of decentralization and subsidiarity. The Lund *Recommendations on the Effective Participation of National Minorities in Public Life*, OSCE High Commissioner on National Minorities 1999.

286 Thornberry P, 'Minority and indigenous rights at the end of history', 2 Ethnicities, 2002, p. 525.

287 Kymlicka W, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA, 2007), p. 244.

288 Or what Kymlicka calls 'the maximalis reading of effective participation' which entails genuine power-sharing processes, but is too strong to be supported by states in the context of European national minorities. Reasons for why it is easier for indigenous peoples to get such claims respected are diverse and explored elsewhere, but mainly relate to the fact that in general indigenous groups are seen to pose a lesser threat to national security and territorial integrity.

289 See e.g. CERD, General Recommendation XXIII, Indigenous Peoples, Fifty-first session, 1997, paragraph 4(d).

effective participation for indigenous peoples with a set of teeth, and makes a more targeted approach possible.

For both indigenous peoples and minorities, effective participation seems to be an essential element in claiming their rights and pursuing self-determination.[290] The need for effective participation is well described by Patrick Thornberry:

> We will not hear minority and indigenous voices unless they have a platform, unless they 'participate in decisions affecting them'. Participation suggests a voice for communities, not just 'disembodied or decontextualized' individuals. We need to hear 'voices' and, to hear them, they need the security to articulate their concerns, which is their human right, including their economic right. The texts of minority and indigenous rights go beyond the simplicities of participation such as placing a vote in the ballot box, towards broad participatory principles and a more complex notion of participatory democracy.[291]

So although effective participation is fundamental to realize minority and indigenous peoples rights, and pervasive throughout the different international instruments, the concept itself remains vague and susceptible to a myriad of interpretations. A number of very recent reports and studies on the right to effective participation within the UN framework may shed further light on this issue.

In order to get a clear picture of which kind of participatory provisions are under examination and what the place of FPIC is within the framework of the UN Declaration on the Rights of Indigenous Peoples, it is useful to start with a brief overview.

III.2.2 Participatory Provisions and FPIC in the UN Declaration

A short recapitulation is useful here. As was examined in Part II, self-determination is the heart and soul of the indigenous peoples movement. In the perception that is defended in this study, self-determination for indigenous peoples is a dual right aimed at respect for autonomy of indigenous groups on the one hand and at equal participation in the larger political order on the other.[292] This is consistent with the views of the Special Rapporteur on the Rights of Indigenous Peoples on the internal and external dimensions of the right to effective participation, which is examined in the next paragraph. But the

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[290] Effective participation is thus also an exponent of the principle of self-determination, as was described in Part II of this study.

[291] Thornberry P, 'Minority and indigenous rights at the end of history', 2 Ethnicities, 2002, p. 532.

[292] The perception of Self-Determination as a dual right, entailing autonomy and participation is also supported by James Anaya. See: Anaya, 2004.

right or principle of self-determination is a general one and other norms are needed for it to have practical implications. Effective and truly equal participatory processes are necessary precepts for exercising self-determination.[293]

The participatory provisions in the UNDRIP can be understood to specify the "umbrella" concept of self-determination, to make it more tangible and applicable in a wide number of situations.

Within the Declaration the terminology used in the different participatory provisions diverges and expresses a varying range of "discursive" requirements.[294] The Declaration seeks to condition a process of participation as an engagement between two autonomous collectives, i.e. the state and the indigenous nation residing in it.[295] This relational concept is firmly articulated in the preamble to the Declaration whereas:

> The General Assembly, convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the state and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith, solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect.[296]

The Declaration thus emphasizes dialogue, participation, and mutual respect, thereby underlining the focus on internal self-determination, firstly in securing indigenous cultural and political autonomy through its catalogue of substantive rights for indigenous peoples,[297] and secondly, as a participatory process instead of a substantive right to secede from the host state.

The participatory, discursive provisions in the Declaration are framed in different vocabulary expressions ascending in force. This layered system of participatory provisions serves to demarcate different levels of indigenous and state autonomy. Such a delineation of degrees of participatory competences is a

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293 See also: Clavero B, 'The Indigenous Rights of Participation and International Development Policies', Arizona Journal of International and Comparative Law 22, 2005. Clavero indicates that participatory rights are a manefestation of Self-Determination. Furthermore, Free, Prior and Informed Consent is consistent with this right to unrestricted participation. (p. 41/42)

294 *Cf.* Miller R A, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination', American Indian Law Review 31, 342 2006-2007.

295 Following Russel Miller who states that the UN Declaration maps the procedural commitments necessary for discourse. Miller R A, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination', American Indian Law Review 31, 342 2006-2007..

296 United Nations Declaration on the Rights of Indigenous Peoples, UN A/RES/61/295, preamble, paragraph 19 and 25.

297 Miller R A, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination', American Indian Law Review 31, 342 2006-2007, page 366.

very delicate and complex issue, but illustrates the ambitious efforts in the context of the Declaration.

The least powerful terminological standard is "*in conjunction with*," used in the Declaration to impose a set of positive obligations on states. The "in conjunction with" criterion is enshrined in Article 11(2) on redress, Article 12(2) on access and repatriation of ceremonial objects and human remains, Article14(3) on education in the indigenous language, Article 22(2) on economic and social development, Article 27 on the recognition of indigenous laws, traditions, customs, and land tenure systems, and in Article 31(2) on cultural heritage, traditional knowledge, and other cultural or indigenous ways of expression, like science, technology, medicine, and knowledge on flora and fauna.

As mentioned, these are all positive obligations for the state. Whereas states are obliged to provide service and support for indigenous peoples, they do so "in conjunction with" them, instead of "at their bidding."[298] The distinction between the criterion "in conjunction with" and the possibly stronger standard of *"in consultation and cooperation with"* indigenous peoples is less clear; a discursive standard also used in relation to positive obligations of the state to implement legislative measures.[299]

This standard is used in Article 15(2) on the promotion of tolerance and the elimination of discrimination, Article 36(2) on maintaining and developing contacts, relations and cooperation with their own and other peoples' members, and Article 38 on legislative measures in general with the aim of achieving the ends of the Declaration.

Article 30 uses the different requirement of "prior effective consultations" in relation to military activities on Indigenous lands and territories. The meaning of the word "effective" in Article 30 is not completely clear. It seems that genuine consultation and cooperation should always be aimed at being effective. In this light, the word "effective" could even be seen as weakening the discursive scope of the other provisions in which "consultation and cooperation" is codified.[300]

The standard of consultation and cooperation is also used in Articles 19 and 32(2) together with the strongest expression of indigenous self-determination, that of "free, prior and informed consent." The central principle in this study can also be found in Article 10 on relocation, Article 11(2) on cultural, spiritual, intellectual, and religious property, Article 28 on redress for damage, confiscation, or occupation of their lands, and Article 29(2) on the storage and disposal of hazardous materials. Free, prior and informed consent is rapidly gaining ground as one of the most important principles guiding indigenous

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298 Miller R A, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination', American Indian Law Review 31, 342 2006-2007, page 371.

299 Russel Miller calls these norms 'discursive standards', see: Miller R A, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination', American Indian Law Review 31, 342 2006-2007.

300 Miller R A, 'Collective Discursive Democracy as the Indigenous Right to Self-Determination', American Indian Law Review 31, 342 2006-2007, page 372.

peoples protection. Its consensual element, at first sight, might even entail a "veto" power or a "right to say no" on behalf of the group affected. This study argues that FPIC should not be seen as a veto power but that the concept's general aim is to fully integrate indigenous peoples into decision-making processes that affect them. It is therefore better to focus on how these processes should be shaped than to restrict the debate to whether FPIC includes a right to block decisions. Taken together, the UNDRIP contains more than 20 provisions that relate to the right of indigenous peoples to participate in decision-making.[301]

Thus, the participatory provisions in the Declaration have an external perspective, they focus on the interaction between indigenous peoples as distinct collectives versus the larger political order in which they reside, the state.[302] Nevertheless, as will be argued later on in this study, the participatory provisions, and FPIC in particular, are also important in light of the internal dimension of self-determination.

Accordingly, effective participation is "layered" in the Declaration. There are diverging participatory provisions along a spectrum of which its most powerful expression is found in the terms free, prior and informed consent. FPIC is more than a procedural requirement in some key provisions in the Declaration and has become a central principle that pervades a wide variety of standards pertaining to the protection of indigenous peoples. Examination of the international and regional standard setting and cases will be dealt with in part V of this study. The adoption of the UNDRIP triggered a number of research projects on its scope and applicability, particularly in relation to participation rights. A number of studies conducted in the UN Context will be examined next.

After exploring the current state of affairs within the UN context, James Tully's theory of intercultural constitutionalism will be explored, since it offers an attractive conceptual lens through which effective participation and FPIC could be perceived. Tully explores the preconditions necessary for effective participation of indigenous groups in contemporary constitutionalism.

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301 A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010. The report mentions: (a) the right to selfdetermination; (b) the right to autonomy or self-government; (c) the "right to participate"; (d) the "right to be actively involved"; (e) the duty of States to "obtain their free, prior and informed consent"; (f) the duty to seek "free agreement" with indigenous peoples; (g) the duty to "consult and cooperate" with indigenous peoples; (h) the duty to undertake measures "in conjunction" with indigenous peoples; and (i) the duty to pay due "respect to the customs" of indigenous peoples.

302 Recall this distinction between internal and external 'internal' self-determination, that was explored in Part II.

III.2.3 The United Nations System: The Right to Effective Participation as a General Framework

So far it was argued that effective participation is an essential element for the protection of minorities and indigenous peoples. Within the framework of the United Nations, there have been a number of recent studies and reports dealing with the right to effective participation, consultation, and FPIC. The following paragraph examines this research, starting with the study on indigenous peoples and the right to participate in decision making, by the UN Expert Mechanism on the Rights of Indigenous Peoples.[303]

The report observes the connection between self-determination, effective participation, and free, prior and informed consent and points out that although these concepts are of vital importance to indigenous peoples, there are still a number of ambiguities that require further research.

One of the main objectives of the programme of action for the Second International Decade of the World's Indigenous Peoples is:

> To promote the full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights, or any other aspects of their lives, considering the principle of free, prior and informed consent.[304]

In October 2009, the Human Rights Council requested the Expert Mechanism to study the right to effective participation in accordance with its mandate, and to present a progress report in 2010 and a final report in 2011. The Expert Mechanism reports can be seen as the most comprehensive studies this far on the subject and the findings will therefore be examined next.

Indigenous participation in decision-making on the full spectrum of matters that affect their lives is seen as the fundamental basis for the enjoyment of the full range of human rights. The principle is related to self-determination and, as was explored in the preceding paragraphs, a "corollary of a myriad of universally accepted human rights, and at its core enables indigenous peoples to be freely in control of their own destinies in conditions of equality."[305] The Expert

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303 See: A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010. A/HRC/EMRIP/2011/2, Final study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, 26 May 2011. A/HRC/18/43, Report of the Expert Mechanism on the Rights of Indigenous Peoples on its fourth session (Geneva, 11-15 July 2011), 19 August 2011. In part IV, the mandate and characteristics of the Expert Mechanism will be discussed.

304 GA, A/60/270, Draft Programme of Action for the Second International Decade of the World's Indigenous People, 18 August 2005, p. 4.

305 A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010, p 3.

Mechanism found that without this right, both the individual and collective human rights of indigenous peoples, cannot be fully enjoyed.

The UNDRIP distinguishes between internal and external participation since it affirms the right of indigenous peoples to develop and maintain their own decision making structures while they also have the right to participate – externally - in decision making processes and the political order of the state in which they reside.[306]

In his 2010 interim report to the General Assembly, James Anaya, the second Special Rapporteur on the Rights of Indigenous Peoples, explained that the internal aspect of the right to participation relates to indigenous peoples' autonomy and self-government, which is necessary for them to take control of their own affairs and to ensure that matters affecting them are aligned with their own cultural patterns, values, customs, and world-views.[307]

The external dimension relates to decision-making by actors that are external to indigenous communities and related concerns.[308] Similar to what is argued in the paragraphs on self-determination, effective participation - and as will be shown further on, FPIC – entail these internal and external components. In the paragraph on FPIC and representation, these components are discussed more thoroughly.

Anaya identified three main areas in which this external participation is relevant. Firstly, it is important in relation to participation of indigenous peoples in public life, although this area concerns mainly individual rights. The second, and for our purposes most important point, that Anaya mentioned relates to the participation of indigenous peoples in decision making by state actors about measures that affect indigenous peoples' rights or interests in particular. The Special Rapporteur noted that:

> In this regard article 18 of the UN Declaration states that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights." This right includes a corollary duty of States to consult with indigenous peoples in matters that affect their rights and interests in order to obtain their free, prior and informed consent, as recognized, especially, by article 19 of the Declaration. Last year, I devoted part of my annual report to the Human Rights Council to the duty of states to consult with indigenous peoples and have continued to address this issue in various aspects of my work. Given the complexity the issue, the Expert Mechanism's examination of the

306 A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010, p 3.

307 A/65/264: Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya 9 August 2010, p. 14.

308 A/65/264: Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya 9 August 2010, p. 13.

> matter of consultation and the right to free, prior and informed consent in connection with its study on the right to participation is extremely important.[309]

Anaya thus admitted the need for further study and stresses the importance of this type of external participation. He stated that it is evident that adequate consultation mechanisms are lacking throughout the world and that indigenous peoples do not adequately control their territories in many cases.[310] Moreover, in nearly all the countries he visited as Special Rapporteur, he heard reports of lack of adequate participation in design, monitoring, and delivery of policies that affect indigenous peoples in particular.[311] As a third area, he mentioned the relevance of effective participation of indigenous peoples on the international level. In Part IV and V – Platforms and Practices – more attention will be directed to this area.

That effective participation is closely connected to self-determination and FPIC is clearly articulated in paragraph 5 of the progress report:

> The principle of participation in decision-making also has a clear relationship with the right of indigenous peoples to self-determination, including the right to autonomy or self-government, and the State obligation to consult indigenous peoples in matters that may affect them, based on the principle of free, prior and informed consent. These legal concepts form an inherent part of any discussion of the right of indigenous peoples to participate in decision-making, and will be considered throughout the report as important aspects of that right.[312]

The report described the relation between self-determination and participation, and is in line with the meaning ascribed to self-determination in part II of this work. Moreover, FPIC is posited as an important associated principle. These three legal concepts and their interrelation are closely examined in the Expert Mechanisms study.

Self-determination is the normative basis for the right to participation and should be seen as an ongoing process of participation in which indigenous peoples are enabled to control their destinies and pace of economic, cultural, and

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309 Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, 12 July 2010.

310 A/65/264: Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya 9 August 2010, p. 14.

311 A/65/264: Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya 9 August 2010, p. 15.

312 A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010, p 3.

social development.[313] Free, prior and informed consent is seen by indigenous peoples as a requirement, prerequisite, and manifestation of the exercise of their right to self-determination.[314] The Expert Mechanism identifies FPIC as of fundamental importance for indigenous peoples' right to effective participation since it establishes the framework for all consultations relating to the acceptance of projects affecting them.[315] FPIC thus qualifies and specifies what a right to "effective participation" amounts to. The remainder of this study is largely dedicated to exploring *how* FPIC could do this.

The normative "roots" of self-determination and effective participation are thus expected to be specified by reference to FPIC. The report concludes that:

> The right of indigenous peoples to free, prior and informed consent forms an integral part of their right to self-determination. […] As the right to free, prior and informed consent is rooted in self-determination, it follows that it is a right of indigenous peoples to *effectively determine* the outcome of decision-making processes impacting on them, not a mere right to be involved in such processes.[316]

As was identified in part II, FPIC is especially important in relation to the struggle of indigenous peoples to gain control over their lands and resources. Not surprisingly, the Expert Mechanism report emphasizes the need for clarity concerning the implementation of FPIC in relation to projects affecting indigenous livelihoods. It is stressed that "pro forma consultations" are not enough, and that effective participation and FPIC implies real influence in the decision making processes.[317]

Unfortunately, many decisions relating to development projects on indigenous territories are taken without respecting FPIC or without any form of effective participation. These decisions often drastically affect indigenous

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313 Recall that self-determination was described as an ongoing process as well. In the next paragraph it will be illustrated that James Tully sees continuity as one of the fundamental principles for an intercultural dialogue.

314 A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010, p 10.

315 A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010, p 10.

316 A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010, p 12. Italics added.

317 Les Malezer has indicated that such 'pro forma' consultation processes are often manipulated as public relations tools to endorse proposals regarding development projects, by demonstrating so-called community support, citing irrelevant comments and downplaying dissenting voices. A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010, p 21.

communities and may have profound effects on indigenous peoples' social and economic structures, both in the short and the long term. It is therefore not strange that FPIC is seen as most needed in these situations.

This right to effective participation also includes a corresponding duty for the state to consult indigenous peoples. Effective participation and the duty to consult have recently been studied by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya.[318]

The Corollary Duty to Consult

In his 2009 report to the Human Rights Council, Anaya noted that often and in a wide variety of situations there is a lack of adequate implementation of the duty of states to consult with indigenous peoples concerning decisions affecting them. He also commented that involvement of indigenous peoples at the earliest stages of such decision-making processes is vital, and that lack thereof leads to conflictive situations, anger, mistrust, and in some cases, violence.[319]

Anaya focused on two important areas in which the duty to consult is essential: in the context of constitutional and legislative reforms that affect indigenous peoples and in relation to development projects concerning resource extraction.[320] Anaya stated that the duty to consult is a corollary of a myriad of universally accepted human rights, like the rights to cultural integrity, equality, and property.[321]

More fundamentally, Anaya contended, the duty to consult derives from the overarching right of indigenous peoples to self-determination and from related principles of democracy and popular sovereignty.[322]

Self-determination responds to the aspirations of indigenous peoples worldwide to be in control of their own destinies under conditions of equality and to effectively participate in decision-making that affects them. Moreover, Anaya argued that self-determination is a foundational right consistent with

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318 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009.
A/HRC/15/37, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 18 July 2010.

319 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 12.

320 Anaya observes that such development programmes and projects, despite their specific effects on indigenous peoples and their territories, are often undertaken without adequate consultation with them or without their free, prior and informed consent. These two areas reflect the text of Articles 18, 19 and 32 of the UNDRIP.

321 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 14.

322 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 14.

principles of popular sovereignty and democracy.[323] These principles imply a duty to consult indigenous peoples in decisions affecting them, with the aim to:

> reverse the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on indigenous peoples, and to allow them to flourish as distinct communities on lands to which their cultures remain attached.[324]

For indigenous peoples, this may require special, differentiated consultation procedures when state activities affect them.[325] The justification of such differentiated procedures arises from the nature of the interests involved. Indigenous peoples have distinct cultural patterns and histories, and usually the normal democratic and representative processes do not work adequately to address their particular concerns.[326] They are often marginalized in the political sphere, and therefore there is a need for special measures to address their disadvantaged position.[327]

Anaya conceded that it would be unrealistic to say that the duty to consult applies whenever a state decision may affect indigenous peoples, since this is very often the case. Nevertheless, a purposive interpretation of the UN Declaration in light of other international instruments and case law lead him to the following assessment of the scope of the duty to consult:

> It applies whenever a state decision may affect indigenous peoples in ways not felt by others in society. Such a differentiated effect occurs when the interests or conditions of indigenous peoples that are particular to them are implicated in the decision, even when the decision may have a broader impact, as in the case of certain legislation.[328]

Importantly, in relation to lands and resources, Anaya noticed that this duty does not only arise when rights to land or other legal entitlements are already *recognized*, but whenever their particular interests are at stake.[329]

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323 Self-determination as a core democratic entitlement was explored in Part II. *Also see*: Franck T 'The Emerging Right to Democratic Governance' Am. J. Int'l L. 86, 1992.

324 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 15.

325 The phrase 'group differentiated rights' was coined by Will Kymlicka in his 1995 book: Kymlicka W, *Multicultural Citizenship* (OUP, Oxford 1995).

326 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 15.

327 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 15.

328 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 15.

329 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 15. Later in this

Conclusions

This paragraph has sought to illustrate the central place that a right to effective participation takes within contemporary international law on indigenous peoples' protection. In the 2011 report to the Human Rights Council, co-author John Henriksen highlighted the three crucial concepts in relation to effective participation of indigenous peoples in decision making: self-determination, the duty to consult, and the duty to obtain free, prior and informed consent.[330] Effective participation is intimately connected to and grounded in indigenous peoples' right to self-determination.

As Anaya has convincingly argued, the duty to consult indigenous peoples is a corollary to the right to effective participation. The principle of free, prior and informed consent may clarify the content and objective of effective participation and could allow for a more targeted approach. Nevertheless, although the recent reports and studies shed light on the issues involved, they also indicate that there are still a number of questions left unanswered and problems to solve.

The lack of indigenous peoples' participation, consultation, and consent remains a major problem, especially in relation to development projects and resource extraction activities on indigenous territories.[331] Without effective participation in decision making on matters concerning their livelihoods, indigenous peoples will not be able to fully enjoy their rights to lands, resources and the overarching right to self-determination.

Implementation of participatory norms on the national level is all too often absent. While the details of participatory arrangements are contexts specific, some general observations can be made on how multi-nation states can accommodate intercultural negotiation processes. This is the question that James Tully posed in "Strange Multiplicity." The constitutional framework of the state has to be susceptible to indigenous demands to effective participation and FPIC. Tully's research deals with the question of how such recognition of cultural diversity is made possible. He provides a principled framework for implementation of participation and intercultural dialogue on the national level, and his theory will therefore be examined next.

Subsequently, the remainder of Part III will be dedicated to examining the different elements and requirements of the concept of free, prior and informed consent. In order to examine FPIC further, it is necessary to first provide a basic contemporary understanding of the concept. Different perspectives on FPIC and on its separate elements – mainly free and informed – are presented. It is illustrated that for a successful FPIC process, securing that consent is given "free, prior and informed" is vital. Afterwards, the paragraph on FPIC and

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study, when examining the position of the Orang Asli on the Malaysian Peninsula, it will be shown why this is such an important observation.

330 A/HRC/18/43, Report of the Expert Mechanism on the Rights of Indigenous Peoples on its fourth session (Geneva, 11-15 July 2011), 19 August 2011.

331 Also see: A/HRC/15/37, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 18 July 2010.

representation will pinpoint a number of specific issues that make obtaining FPIC in the context of indigenous peoples problematic.

However, first James Tully's views on the need for participation and dialogue in states with multiple nations are examined.

III.2.4 Participation: James Tully and the Preconditions for Peaceful Intercultural Dialogue

Introduction

Participation rights and free, prior and informed consent are seen as essential instruments to realize indigenous peoples' right to self-determination and to negotiate constructive agreements about their rights to lands and resources. An important precondition for implementation, is that the national - political and legal - system has to be susceptible to accommodation of these participatory standards for indigenous peoples.[332] The following paragraphs will explore James Tully's framework for an intercultural dialogue and examine a central issue in this study: what kind of principles and mechanism need to be in place to make constructive and lasting agreements between indigenous peoples and their host states, or other parties, possible? And what are the justifications for these suggested self-rule mechanisms?

Indigenous peoples' struggles are struggles for constitutional recognition of their collective identity and their collective rights to self-determination, lands, resources, and participation. The central question therefore is: What kind of constitutional or legal viewpoints can accommodate such culture-differentiated participation rights on the national level? James Tully discussed this question in his influential work, *Strange Multiplicity*.[333]

FPIC is primarily relevant in relation to the situation that Tully describes, situations of "internal self-determination" where indigenous groups are to coexist and participate with others in the framework of a larger state.[334] In this framework, indigenous peoples are to conclude and negotiate agreements that may have profound effects on the social structures of communities and may lead to long-term arrangements and relations. Tully's work is therefore directly related to an important question in this study: Why should states accept this FPIC principle for indigenous peoples?[335] What is most important to the present study is that Tully provided the foundations for an intercultural dialogue on the national level, a dialogue in which similarities and differences between

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[332] As was described earlier, a number of states expressed their doubts about the desirability of indigenous peoples rights to self-determination and FPIC in the context of the UNDRIP.

[333] Tully J, *Strange Multiplicity, Constitutionalism in an Age of Diversit* (Cambridge University Press, 1995) (Tully, 1995).

[334] Consistent with the view of self-determination as a continuous participatory process, examined in paragraph II.1.

[335] Tully, 1995. James Hamilton Tully is the Distinguished Professor of Political Science, Law, Indigenous Governance and Philosophy at the University of Victoria, Canada.

indigenous groups and others can be mapped in order to get to a common understanding about appropriate forms of self-rule.[336] Tully offered a method or structure for effective participation and self-determination by laying out the parameters of an intercultural dialogue on the national level. This structure will be supplemented in later paragraphs, mainly in the paragraph on freedom, and will be guiding in explaining the legal infrastructure FPIC requires.

Tully explained that demands for cultural recognition are ultimately claims to a form of self-rule, or self-determination.[337] Recognition of cultural identity thus could entail certain "self-government" rights. Denying such claims for a certain community – misrecognizing them – may inflict serious harm and even threaten their survival.[338] Tully sought to: "outline both the philosophy and practice of constitutionalism informed by the spirit of mutual recognition of cultural diversity. Both the philosophy and the practice consist in the *negotiation* and *mediation* of claims to recognition in a dialogue governed by the conventions of mutual recognition, continuity and consent."[339]

Tully's powerful argumentation will be discussed next. His theory provides a normative framework for implementation of indigenous peoples' right to (internal) self-determination. Moreover, a number of important preconditions for successful FPIC processes can be found in Tully's work.

FPIC is a corollary to indigenous peoples' right to self-determination and concerns a claim situated in politics and international law. If states are to be persuaded to accept FPIC, merely determining its current legal status might be a bit helpful, but certainly not enough. FPIC and its related "right to effective participation" have to fit into the constitutional framework of the state, whereas it is a claim to alter or retain the contemporary "constitutional" arrangements between indigenous peoples and other political actors.

James Tully's theory of intercultural dialogue, or what he calls a *multilogue*, provides a framework for realizing FPIC on the national level. Furthermore, by perceiving FPIC in light of Tully's theory, it will be exposed that there are

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336 Forms of self-rule or self-determination, like rights to FPIC or other participatory structures.

337 Sharp A, 'What is the constitution of "The Spirit of Haida Gwaii"? Reflections on James Tully's strange multiplicity: Constitutionalism in an age of diversity', 10 History and Anthropology, p. 243, 1997, p. 243. (Sharp, 1997).

338 Ivison D, 'Does The Spirit of Haidi Gwaii Fly Only at Dusk?', 1 Theory & Event, at 4, 1997. Also see: Taylor C, 'The Politics of Recognition' in Amy Gutmann, *Multiculturalism, Examining the Politics of Recognition* (Princeton University Press, Princeton, 1995), p. 25. Charles Taylor has described the demand for recognition as being a vital human need, and the misrecognition of someone or some group as being capable of: "inflicting a grievous wound, saddling its victims with a crippling self-hatred." Since our identity is partly shaped by recognition of others, and misrecognition could result in real damage and distortion to a person or group, it is a notion to take seriously. Also see p. 62, where Taylor accuses 'difference-blind liberalism' that it cannot provide the neutral ground on which people of all cultures can meet and coexist, since liberalism itself is a 'fighting creed', a particular perception that cannot and should not claim complete neutrality.

339 Sharp, 1997, p. 244, citing Tully, 1995.

certain fundamental problems involved in seeing FPIC as a concept that is unilateral in application and can be brought under a single comprehensive definition.[340]

Moreover, it will become clear that a requirement of consent is not something new or invented recently as a procedural solution for the problems that indigenous communities face but rather is a basic convention of interaction between and within political entities, derived from the core democratic principle *quod omnes tangit, ab omnibus approbetur* (what touches all, must be approved by all).

International law is predominantly an extension of the Western language of liberal democratic theory, and an important question therefore is: How could FPIC, as a term expressed in the classic language of international law, become an effective concept on the national level for this most differentiated situation of cultural diversity; that of the global indigenous peoples movement?

Tully's answer, which provides a framework for FPIC and effective participation processes is that when such negotiations are held in accordance with the principles of *mutual recognition*, *continuity*, and *consent*, they will be respectful of cultural differences. As an elegant example, Tully described the sculpture "The Spirit of Haida Gwaii" made by Bill Reid, which depicts a black canoe with a culturally diverse set of passengers, who, in spite of their differences, will have to navigate some common course.[341]

III.2.4.1 Liberal Constitutionalism in Multi-Nation States

Strange Multiplicity

The parts of Tully's argument that are most relevant to this study will be explained. The - very broad - question Tully addressed is: can a modern constitution recognize and accommodate cultural diversity? Strange Multiplicity starts by providing examples of the current struggles for recognition and explains that if sharp boundaries are drawn around these types of struggles, their similarities are overlooked. Tully took aboriginal struggles for recognition as his main example.[342]

Three important elements are mentioned: first, demands for recognition are aspirations for appropriate forms of self-rule, secondly and complementarily,

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340 The argument that seeking for a uniform standard of FPIC is not desirable, is further elaborated upon in the paragraph on information and communication.

341 *Cf.* Sharp, 1997, p. 247: Each of the creatures in the canoe sees and lives a life differently from the others, they see the others from their individual points of view, they communicate their understandings and desires, they argue as to their destination and as to a thousand other matters, their own identities are not set (the identiy of each consisting in the innumerable ways it relates to and interacts with the others), they live together as well as apart, they are in the same canoe, they belong together because they live with the others.

342 Tully, 1995, pp. 1-3. Tully mentions six examples of struggles for cultural recognition that intersect and overlap each other to a large extent. These are: (a) national, (b) supranational, (c) intercultural, (d) feminist and (e) aboriginal struggles for recognition.

there is the claim that the basic laws, institutions, and methods of interpretation of modern societies are unjust insofar as they do not allow for appropriate forms of self-government, and thirdly, the ground for these claims is the assumption that culture is a constitutive and irreducible aspect of politics.[343] The link with contemporary international law on indigenous peoples as described in this study immediately becomes visible. Self-determination related claims are claims to take cultural diversity into account in decision-making processes that affect indigenous peoples.

Constitutions, understood in a broad sense, cannot ignore this cultural dimension of politics and the argument therefore is that if the cultural ways of the citizens were recognized and taken into account in reaching agreement on certain constitutive arrangements, the order would be perceived as just with respect to this dimension of politics.[344] The first step towards this is to establish a just form of constitutional discussion that recognizes these aspirations to self-rule in alignment with one's own customs and ways. Tully argued that these are struggles for liberty, understood as self-rule and non-domination[345] and stated that what is distinctive of our age is the multiplicity of demands for recognition at the same time, calling for a variety of forms of self-rule.[346]

For indigenous peoples, claims to self-rule are expressed in their claims to self-determination and derivative rights. Reaching agreement on important issues through culturally appropriate processes is the essence of self-determination processes and Tully provided the basic framework that ought to exist on the national level to implement FPIC and participation rights for indigenous peoples.

Mutual Recognition

According to Tully, the key question is: "whether a constitution can give recognition to the legitimate demands of the members of diverse cultures in a manner that renders everyone their due, so that all would freely consent to this form of constitutional association."[347] This first step – mutual recognition – cannot entail classic nationalist assimilation of one culture at the expense of another, nor can it mean the recognition of each culture in the same constitutional form, for cultures are not analogous to the classic constitutional concept of a nation (as in one nation – one state).[348] Nations can – or should be able to - achieve just recognition within multinational federations of various kinds.

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343 Tully, 1995, pp. 4-6.
344 Tully, 1995, p. 6.
345 In paragraph III.3.1, it is explained that a principle of 'non-domination' is best suited to guard the political freedom of indigenous peoples. 'Non-dominance' is a central element in the working definitions of indigenous peoples.
346 Tully, 1995, p. 6.
347 Tully, 1995, p.7.
348 Tully, 1995, pp. 7-8.

An important point that Tully stressed is that the outdated conception of cultures as separate, bounded, and internally uniform has to be replaced by a view of cultures as (a) overlapping, (b) interactive, and (c) internally negotiated.[349] Cultures do not only overlap geographically and come in a variety of types; they are also densely interdependent in their formation and identity, and exist in complex historical processes of interaction with other cultures.[350] Moreover they are not internally homogenous but continuously contested, imagined, and negotiated, both by their members and through interaction with others; this means that identity is constructed in a way that Tully called *"aspectival"* rather than essential. Cultural identity changes as it is approached from different views so cultural diversity entails a "labyrinth of intertwining cultural differences and similarities."[351]

As a consequence of the overlap, interaction, and negotiation of cultures, the experience of cultural difference is *internal* to a culture.[352] Contrary to an essentialist view, in which cultural horizons are fixed and the concept of "otherness" is per se associated with another culture, the *aspectival* view entails that one's cultural horizon changes as one moves about.[353] The experience of otherness is internal to one's own identity, which consists in being oriented in an aspectival intercultural space characterized by overlap, interactivity, and internal negotiation.[354] As such, citizens are always on some sort of common ground with diverse others who exhibit both cultural similarities and differences.[355] This new view complicates mutual recognition, but according to Tully, also makes it *possible* by the exposure of a common ground.[356]

Nevertheless, according to Tully most theorists still continue to uphold variations of the old (imperial) view; that of humans situated in closed, homogenous, and independent societies and cultures.[357] For a good

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[349] Tully, 1995, pp. 10-11. An important insight that helps in explaining FPIC processes, and possible problems that may arise in such processes.
[350] Tully, 1995, pp. 10-11. This old "billiard ball" conception of cultures, led in the past to principles like the Wilsonean idea of "one nation, one state." This has proven to be unattainable and undesirable.
[351] Tully, 1995, p. 11.
[352] Tully, 1995, p. 13.
[353] Tully, 1995, p. 13. Tully explains that on an essentialist reading of culture, the "other" and the experience of "otherness" were per se associated with another culture. The "own" culture provides an identity shaped as a seamless background or horizon against which it was determined where one stood on fundamental questions. Losing such a fixed horizon led to an "loss of all horizons" and subsequently to an "identity crisis." On Tully's "aspectival" view, cultural horizons change as one moves about, just like natural horizons.
[354] Tully, 1995, p. 13.
[355] Tully, 1995, p.14.
[356] Tully, 1995, p.14. Citizens are from the outset on a negotiated, intercultural, and aspectival middle ground, with some degree of experience of cross-cultural conversation and understanding; of encountering and being with diverse others who exhibit both cultural similarities and differences.
[357] Tully, 1995, p.14.

understanding of FPIC, the overlapping nature of culture is essential.[358] This is so, because FPIC processes take place in dynamic settings of overlapping and interdependent identities and allegiances; especially in cases in which large scale development projects trigger rapid change in indigenous societies.

These claims for cultural recognition constitute grave problems in the present age and should not be separated from other social relations; culture is a way of relating to others in any interaction, a way of following or challenging a social rule, and consequently a dimension of any social relation. Modern constitutionalism, first devised as a solution to these kinds of problems, now forms part of them.[359]

Modern constitutionalism developed over two main forms of recognition; i.e. equality of self-governing nation-states and equality of individuals.[360] Moreover, it developed in opposition to *imperialism*. Recently this development is characterized by claims to cultural recognition.[361]

This "stage", as was also described in the paragraphs on self-determination, is not concerned with "peoples" acquiring independent statehood; but seeks recognition *within and across* existing nation-states. In this way it is also a counter-imperial movement, but one that cannot simply be accommodated within the framework of conventional modern constitutionalism or international law. Tully investigates how much of the inherited forms of modern constitutionalism need to be adapted to accommodate these "new" demands for cultural recognition.[362]

A post-imperial dialogue on the just constitution of culturally diverse societies must be one in which the participants are recognized and allowed their own language and customs. Such a transition from an imperial system of imposed procedure to a situation of genuine inter-cultural popular sovereignty, a *multilogue*, is according to Tully the most important and most difficult first step towards what he called *contemporary constitutionalism*.[363] Such a multilogue is exactly what is required in FPIC processes, if it is to become a realistic and effective instrument to facilitate intercultural decision-making.

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358 One of the points that is stressed throughout this study is that any successful application of FPIC entails external as well as internal participation and has to leave room for internal dissent and negotiation. More on this is examined in paragraph III.3.4, on consent and representation.
359 Tully, 1995, p. 15
360 Self-determination of individuals and of peoples. P. 15.
361 Tully explains that such opposition against imperialism developed first externally against the Holy Roman Empire and the Papacy in Europe and internally against the feudal absolutist systems, secondly, by the external self-determination movements of former colonial peoples, and now by the politics of cultural recognition.
362 Tully, 1995, p. 17. Destruction of present constitutions through revolution and violent conflict does not seem desirable.
363 Tully, 1995, p. 24.

This ability to perceive relations from multiple viewpoints, or reflective disequilibrium, changing perspectives – or see and understand aspectivally – is acquired only through participation in the inter-cultural dialogue itself.[364]

A constitution, according to Tully, can be both the foundation of democracy and, at the same time, can be subject to discussion and change in practice. To understand the place of FPIC and participation rights of indigenous peoples in this context - as expressions of their struggle for self-determination - it is noteworthy that Tully sees a constitution as an endless series of contracts and agreements, reached by periodical intercultural dialogues.[365] The chapters of "Strange Multiplicity" explored the viability of such a system.[366] Claims to FPIC - flowing from claims to self-determination - can be perceived as a similar type of dialogue and agreement.

Diversity and Contemporary Constitutionalism

A contemporary constitution can recognize cultural diversity if it is reconceived as "a form of accommodation" of cultural diversity. A constitution should be understood as an intercultural dialogue in which the diverse citizens of a contemporary society negotiate agreements on their form of association in line with three basic conventions or principles: (a) mutual recognition, (b) consent, and (c) continuity.[367]

Tully investigated the main conventions of contemporary constitutionalism comprising dominant, modern, and subordinate "common" language, and their theorists main responses to questions of cultural diversity.[368] He employed Wittgenstein's methodology: not by presenting another comprehensive solution, but by a survey which brings to light the unexamined conventions that govern the language games in which both the problem and the range of issues arise.[369]

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364 Tully, 1995, pp. 25-27. This dialogue should be perpetual, since recognition can never be definitive (or identities fixed or determined); There should always be a willingness to listen to voices of doubt and dissent within and to renegotiate the present arrangements: Tully calls this 'a sovereignty of the existing peoples' instead of a sovereignty of existing constitutions.

365 Tully, 1995, p. 26. Tully opposes views of constitutions as an original contract, ideal-speech situation or mythical unity of the community. His strong critique on other democratic theorists falls outside the scope and purpose of this research. What is important here, is under what conditions an intercultural dialogue is best accommodated.

366 Tully, 1995, p. 29.

367 Tully, 1995, p. 30. The next paragraph will further explain these conventions.

368 Tully, 1995, pp. 30 – 34. Also see these pages for an overview of the subsequent chapters and the general argument. This immensely complex dominant vocabulary is for the purpose of 'Strange Mulitplicity' divided into three main authoritative schools of interpretation: Liberalism, Nationalism and Communitarianism, the narrow usage of these schools will be defined as '*modern constitutionalism'*. The broader language of '*contemporary constitutionalism*' will be shown to be more complex than the three schools, and neither exclusively imperial nor European in nature.

369 Tully, 1995, p. 35. By means of this method, it will be possible to critically assess which conventions unjustly frustrate cultural recognition and need revision, and conversely which conventions remain standing and show other claims to recognition to be unjust.

The first, but often overlooked, step in any inquiry into justice, is investigating if the *language* in which the inquiry proceeds is itself just; i.e. capable of rendering the relevant speakers their due.[370] This is invaluable within the politics of cultural recognition since one of the central objections is that people are not recognized in their own cultural language or voice: *"audi alterem partem."*[371]

Claims for recognition by e.g. indigenous peoples, firstly, are to be made in the prevailing language of constitutionalism if they are to be recognized as constitutional demands at all.[372] Secondly, these claims are then critically examined according to these conventional criteria; e.g. people, nation, sovereignty, self-determination. This is not to say that these conventional criteria remain the fixed and unquestioned norms; the recognition claim is of course a demand to revise and adapt these norms.

Tully explained that the modern constitutions came into being in opposition to the "ancient constitutions" in the seventeenth and eighteenth centuries in Europe and comprise seven main features or conventions that are shared among the authoritative schools of interpretation and serve as a common blue-print.[373]

The challenge cultural recognition poses does not fit within this existing frame, where it entails the claim that forms of recognition fail to take into account cultural diversity from the outset, resulting in exclusion or assimilation of cultural difference.[374] Tully explains that criticism from different sides has pointed out this exclusionary nature of the dominant tradition and that a dialogue is needed in which other modes of speaking and the overlapping, negotiated, and interacting nature of culture are recognized.[375]

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370 Tully, 1995, p. 34.

371 Tully, 1995 pp. 34-35. The language in which a people is constrained to bring their claims is that of the 'master', European, colonial, western. Tully states that therefore the 'ethical watchword' of the post-Imperial age is 'listen to the voices of others' and to abide by the principle of self-identification, in international law and elsewhere.

372 Tully, 1995, p. 39. E.g. indigenous peoples seek recognition as 'peoples' with the 'right to self-determination. Indigenous groups do not only take their refuge to international law and human rights discourse, but are also forced to use it, before they can critically examine the language itself.

373 Tully, 1995, p. 41. These features will be exposed in the next paragraphs.

374 Tully mentions three non-authoritative schools that aim to challenge the hegemony of the authoritative traditions: (a) post-modernism, (b) cultural feminism and, (c) interculturalism. These schools share the argument that the three authoritative schools (formed by European men in an age of imperialism) do not challenge the foundation or framework of their own theory.

375 Tully, 1995, pp. 45-54. *Post modernism* regards the language of modern constitutionalism as an imperial meta-narrative that needs to be thoroughly deconstructed. The shared concept of identity by the authoritative schools is unable to account for a crucial feature of contemporary identity: that it is always different from itself, as well as from others.

Cultural feminists claim that participation of women within existing institutions is not sufficient, since these have been established by men, to the exclusion of women, and have a masculine partiality. The institutions and traditions themselves thus have to change, allowing for a dialogue in which other ways of speaking are recognized on equal footing with the dominant language.

The confrontation between the politics of cultural recognition and modern constitutionalism thus faces an impasse: How can the proponents of recognition bring forth their claims in a public forum in which their cultures have been excluded or demeaned for centuries?[376] *"Strange Multiplicity"* seeks to expose the way a just dialogue is precluded by the conventions of modern constitutionalism. The imperial assumption that defenders of modern constitutionalism uphold is that when they take up claims for recognition, understanding what the claimants are saying needs placing it within an inclusive language or conceptual framework in which it can then be adjudicated.[377] According to Tully, there is not one such comprehensive language or view; in post imperial dialogue - multilogue - one must listen not only to what is said, but also in which language it is spoken; an inter-cultural dialogue which does not presuppose one comprehensive language.[378]

According to Tully, modern theorists work under the assumption that the identity of modern constitutions consists of some combination of seven predominant features he discussed, thereby providing the comprehensive rule by which all political associations are ranked and identified.[379] This comprehensive

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Intercultural citizens seek liberation by means of the constitutional recognition of suppressed indigenous and non-European traditions of interpretation and corresponding degrees of self-rule. Interculturalists remain skeptical to attempts to stretch the dominant traditions and institutions to accommodate their needs (Kymlicka, Sandel), and point out that these miss the first step, i.e. questioning the sovereignty of the authoritative traditions the serve to legitimate. They remain critical of homogenous conception of identity, but also reject the post-modern deconstructive conclusions. Their challenge starts from the three features of cultural diversity; that cultures overlap, interact and are negotiated and re-imagined.

[376] As was stated, international law is trying to cope with this question now, but the language of international law has always been one which was largely incompatible with indigenous peoples demands.

[377] Tully, 1995, p. 56

[378] Tully, 1995, p.57.

[379] Tully illustrates seven core conventions of modern constitutional theory and proceeds by providing a range of examples on how these seven features of modern constitutionalism have been employed to misrecognize and suppress the cultural diversity of the world: Tully, 1995, pp. 64 – 96. (I) The first feature comprises three forms of *popular sovereignty* which eliminate cultural diversity as a constitutive aspect of politics; (a) the people are in a state of nature-like situation and aspire to constitute one uniform political association; (b) the people are in a society of equal individuals that have attained a 'modern' level of historical development and recognize an authoritative set of European institutions, manners and traditions; and (c) the people are seen as a community bound together by an implicit and substantive common good and a shared set of European institutions and traditions.

(II) Secondly, the modern constitution is defined in contrast to an 'ancient' or *historically earlier* constitution. This imperial character of modern constitutions is made in reference to the stage of development and the irregularity of other, non-European, pre-modern constitutions. The *stages* view has been contested in the 20th Century, since in it, cultures are seen as separate, closed, internally uniform and relative to a stage of socio-economic development.

(III) Third, the *irregularity* of ancient constitutions, as multiform, is contrasted to the modern concept of a (legally and politically) uniform constitution

(IV) The fourth feature concerns the recognition of custom within the theory of progress; modern constitutions recognize the (unintended) transformed character of modern societies.

map is projected over the whole and hides the diversity that actually exists beneath.[380]

Tully explains that Wittgenstein calls this the "Craving for Generality," which, having its source partly in scientific method, has "shackled" philosophy.[381] This craving generates a contemptuous attitude towards those specific cases – the multiplicity of concrete usages – that are incompatible with the general concepts.[382]

Not a single comprehensive rule is discovered, but rather a "complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail," like the constitution of an ancient city.[383] Therefore, the meaning of a word is not bounded by rules everywhere; but if the freedom of language must still be described in terms of rules, it is like a game, where we play and make up the rules as we go along.[384]

(V) Fifth, a modern constitution is identified with a specific set of European institutions; in light of the convergence between European societies, constitutions will inevitably establish a uniform type of legal and political institutions (inter alia: representative government, separation of powers, rule of law, individual liberty, standing armies and a public sphere).

(VI) Sixth, since the American and French revolutions, the constitutional state is seen to possess an individual identity as a 'nation', an imaginary community to which all nationals belong and in which they enjoy equal dignity as citizens. Formal equality of citizens and equality of authority among states is characteristic of modern constitutionalism.

(VII) Finally, a modern constitution comes into being at some founding moment and provides the rules for democratic politics. It is enforced by the assumption that a modern constitution is something universal, where people agreed upon at some particular time; but for all time. The constitution thus seems to precede democracy, and this anti-democratic feature is mitigated by the assumption that 'the people' gave rise to it at a certain time, and that we would consent today if we were reasonable (contractarian).

380 Tully, 1995, p. 105.

381 Tully, 1995, p. 105.

382 Tully, 1995, pp. 106 – 107, Tully explains two of Wittgenstein's arguments for exposing the fault in this assumption and presents a correct way to *understand general terms*. (I) The first argument shows that understanding a general term is not the theoretical activity of interpreting and applying a general theory or rule in particular cases. No matter how elaborate such a rule might be, there is always the possibility of interpreting and applying it in various ways. If there is doubt or the possibility of endless interpretations of a rule, such a rule and its interpretation do not determine meaning. Rather, understanding a general term is nothing more than the practical activity of being able to use it in various circumstances. The uses of general terms, are intersubjective *practices* or *customs* – like tennis or the practice of law – and our *understanding* of them consists in the mastery of a *technique* or *practical skill* exhibited in being proficient players in the particular cases of language games in which they are used. Language thus becomes a game in which *meanings* are the on-going outcome of a perpetual 'batting' back and forth between users of *their* meaning of a term, from which a collective meaning coagulates. (II) Secondly, Wittgenstein argues that the 'grasp' exhibited in 'obeying' or 'going against' a rule in actual cases cannot be accounted for in terms of following general rules implicit in practice because the multiplicity of uses is too various, tangled, contested and creative to be governed by rules.

383 Tully, 1995, p. 107.

384 Tully, 1995, p. 108.

The knowledge and concept of a game is completely expressed in the description of various kinds of games. Hence, understanding a general term consist of being able to give reasons why it should or should not be used in any particular case by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents and drawing attention to intermediate cases so that one can pass easily from familiar cases to the unfamiliar and see the relation between them.[385]

An important element of Wittgenstein's argumentation is the dialogical nature of understanding: this always takes place in interaction with others who see things differently and any monological view is always partial.[386]

Tully summarized his Wittgensteinian argument as follows: to understand a general term and know your way around its maze of uses, it is always necessary to enter into a dialogue with interlocutors from other regions of the city, to listen to their further descriptions and come to recognize the aspects of the phenomenon in question that they bring to light. These are aspects that may go unnoticed from one's own familiar set of examples; that is why consultation of those on the different sides of a case is always necessary. As a result of these exchanges of views, a grasp of the multiplicity of cases is gradually acquired: understanding is dialogical.[387]

Tully concluded that Wittgenstein's philosophy offers an alternative view to modern constitutionalism in that it: (a) provides a way of understanding others without comprehending what they say within one's own language of re-description, (b) it is a philosophical account of how intercultural dialogues promote diversity awareness by enabling the interlocutors different perspectives, and (c) it is a view of how understanding occurs in the real world of overlapping, interacting, and negotiated cultures.[388] This analysis explains why it is so vital to listen to the descriptions and arguments of each party involved, and enter the conversation ourselves in order to find re-descriptions acceptable to all. In this way it becomes possible to mediate the differences that we want each other to recognize.[389]

These general terms of constitutionalism – and international law – like nation, people, self-determination and FPIC are like games, or can be seen as

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385 Tully, 1995, pp. 108-109, The aim is to employ intermediate examples which make manifest a connection with other cases so that a person understands why or why not the term should be used in this case. Calling this activity of finding intermediate cases 'the giving of further descriptions' Wittgenstein compares it to the way reasons are given in a court of law. This exchange of descriptions and rediscriptions does not amount to the formulation of a general rule, since there is none; it (a philosopher's work) simply consists of assembling reminders for a particular purpose.

386 Tully, 1995, p. 109, So, there is no comprehensive view of the uses of a general term; any monological view is always partial to some degree – noticing some aspects at the expense of others. Any one description, therefore, will always remain one heuristic way characterizing the case in question; not a preconceived idea to which reality must correspond.

387 Tully, 1995, p. 110.

388 Tully, 1995, p. 111.

389 Tully, 1995, p. 111.

family resemblances.[390] Within constitutional associations, the rights, institutions, and laws are not identical in every case, but vary with the interacting cultural diversity of the members, again forming a family. Rejecting the very progressive, scientific method of thinking typical to European civilization, a more "common law" like approach is advocated by Tully.[391]

Cultural diversity can be recognized in an intercultural dialogue that does not presuppose one comprehensive language. Tully continued with explaining which principles guide this dialogue. They provide a framework for the participation of indigenous peoples on the national level.

III.2.4.2 Three Principles for Intercultural Negotiations

The most important part of Tully's work for the purposes of this study is his illustration of the three conventions of common (or contemporary) constitutionalism; (a) mutual recognition, (b) consent, and (c) continuity. The principles are also essential to take into account for applying indigenous peoples' right to self-determination and in implementing FPIC processes. These conventions or norms come to be accepted as authoritative *in the course of constitutional practice*, including contestation and criticism of that practice. Tully claimed that: "These three conventions form the sturdy fibers of Ariadne's thread through the labyrinth of conflicting claims to cultural recognition which currently block the way to a peaceful 21st century: if they guide constitutional negotiations, the negotiations and resulting constitutions will be just with respect to cultural recognition."[392] These principles are guiding in explaining what kind of legal structure is needed to implement FPIC requirements.

The first principle of intercultural negotiations is to agree on a form of *mutual recognition* of the parties involved.[393] Without this initial step, fair negotiations and any concept of effective participation regarding self-rule or self-determination is unattainable. This difficult first step and the form that recognition should have is to be determined by means of the intercultural dialogue. Such recognition can of course take different forms, and for indigenous peoples this is often a form of recognition as "indigenous people" wit - some form of - rights to self-determination. Later on in this study, a number of examples will be given of why recognition matters. Constitutional recognition may be highly important for a people's sense of identity and belonging. Recognition of juridical capacity is essential for entering into procedures and for claiming diverse rights. Recognition of - some form of -

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390 Tully, 1995, p. 112.

391 Tully, 1995, pp. 113-119, According to Tully, the great tragedy of modern constitutionalism is that most European philosophers followed Hobbes' monological and scientific method, turning their backs on dialogue just when non-European peoples were encountered, and dialogue and mediation were most needed.

392 Tully, 1995, p. 117, for the examples, see p. 117 ff.

393 In part IV, when examining a number of international and regional cases, this will be further illustrated.

ownership over their lands and resources is often essential for indigenous peoples' cultural and physical survival. These types of recognition are invaluable preconditions for the successful implementation of FPIC processes.

When the correct form of mutual recognition is worked out the second, and most important principle for changing or constituting arrangements on the substantive issues involved, is the principle of *consent*.[394] This is of course the central theme of this study. "Consent" (*quod omnes tangit ab omnibus comprobetur* – what touches all should be approved by all), is the most fundamental constitutional convention, it applies to any form of constitutional association, ensuring that a constitution or an amendment to it rests on the consent of the people, or the representatives of the people who are touched by it. The way it should be applied depends on how the "people" are recognized.[395] The form of consent should always be tailored to the form of mutual recognition of the people involved.[396] Analogously, FPIC is essential for negotiating fair agreements when indigenous communities' rights to land, resources, and self-determination are under threat.

The third principle or convention guiding intercultural negotiations is *continuity*. The mutually recognized cultural identities of the parties are continuous - that is to say that they continue throughout the association agreed upon, unless the participants explicitly consent to amend them.[397] Continuity forms the spirit of "ancient constitutionalism" expressing the view that customs and ways of peoples are the manifestation of their free agreement; to discontinue them without their explicit consent would breach the convention of consent.[398] Self-determination, in its internal form, requires continuous and respectful relations between indigenous peoples and the state. As mentioned, this is also the "spirit" of the UNDRIP. Furthermore, situations in which FPIC comes into play, for example when large-scale development projects on indigenous lands are proposed, will also often create long-term relations and commitments. It is essential not to see FPIC as a single moment of decision-making, but as the foundation for interaction on an ongoing basis.

In the specific example mentioned by Tully,[399] the treaties give rise to a constitutional association of interdependence and protection, but not to discontinuity or subordination to a single sovereign.[400] Tully aims to explore the

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394 Tully, 1995, p. 121, Tully uses the example the Crown in North America where establishment of sovereignty or acquisition of land could only happen when the *consent* of the Aboriginal Nations was gained.
395 Tully, 1995, p. 122.
396 Tully, 1995, p. 123. Following the Marshall example.
397 Tully, 1995, p. 125.
398 Tully, 1995, p. 125. The convention of continuity stands in contrast to 'discontinuity' theories of constitutionalism as for example exposed in Hobbes' Leviathan. In situations of cultural diversity, the modern view that a constitutional association must give rise to one uniform sovereign state that is unlimited by external and internal interdependency is inadequate.
399 Marshall cases, p. 126.
400 Tully, 1995, p 127.

treaty system from an Aboriginal perspective. He asserted that it is extremely important for Aboriginal people to have the capacity to delegate or share various powers of self-government while retaining sovereignty. As such, they will be able to work out, by mutual consent, the degree of self-government appropriate to their particular circumstances, without fear of domination or discontinuity.[401]

An intercultural constitutional dialogue itself is also guided by the three conventions.[402] The intercultural dialogue entails that each negotiator participates in his own language, mode of speaking and listening, form of reaching agreement, and way of representing the people(s) for which they speak – the conditions of *audi alteram partem*.[403]

Tully argued that the presupposition of shared, implicit norms is manifestly false and that the aim of the negotiations over cultural recognition is not to reach agreement on universal principles and institutions, but to bring negotiators to recognize their similarities and differences, so that they can reach agreement on a form of association that accommodates their differences in appropriate institutions and their similarities in shared institutions.[404]

The presumption of an implicit consensus or a universal goal seems to mis-identify the aim of this type of constitutional dialogue, which is filtering out the diverse similarities, and differences the speakers try to voice. In Tully's vocabulary, the world of constitutionalism is not a "uni-verse" but a "multi-verse."[405] Similarly, FPIC processes aim to map these similarities and differences, in order to come to a shared vision on how to appropriately make a decision, respectful of each other's culture and interest.

Mutual understanding is very difficult to achieve, but if it is to be approximated it is through engaging in "the volley of practical dialogue."[406] The participants in the dialogue are gradually able to see the association from the points of view of each other and work out an acceptable inter-cultural language capable of accommodating the truth in each of their limited and complementary views, thereby setting aside the incompatible ones.[407]

Where in modern constitutional theory, the agreement reached in dialogue is foundational, universal, comprehensive, exclusive, and the fixed background for democracy, in Tully's contemporary view, it is open to review and renegotiation in a future dialogue if it is not as fitting as it appeared at the

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401 This is exactly where self-determination and FPIC are about, deciding on the appropriate form of self-rule through a fair intercultural dialogue.

402 Tully, 1995, p. 129.

403 Tully, 1995,. p. 129. Of course the dialogue continues when the negotiators turn to their diverse constituents, what was described earlier as 'internal internal self-determination'.

404 Tully, 1995, p. 131 The three schools of modern constitutionalism disregard the hidden diversity of actual constitutional dialogue by their simplistic concepts of popular sovereignty and their corresponding concepts of constitutional dialogue – monological work that aims to establish agreement on universal principles or norms implicit in the practice (e.g. Habermas).

405 Tully, 1995, p. 131, see 132 for a - negative - example from Delgamuukw v. British Columbia.

406 Tully does not think, that it is impossible though; *Cf.* his comments on Young, p. 134.

407 Tully, 1995, p. 134.

time.[408] As a result of this more flexible and pragmatic image, the concept of reaching agreement is different from the modern one and, in Tully's view, more open to mutual understanding, accommodation, and conciliation among the participants.[409]

Tully's important argument is that when indigenous peoples claim injustice has been done and demand redress, they appeal to the three conventions to justify their case, arguing that their status as nations or peoples has been *misrecognised* and their powers of self-rule *discontinued* and their *consent* bypassed. The biases and unfounded arguments involved can be bypassed; not by creating a comprehensive model to which reality must correspond, but, as Tully does in his book, to survey the practice from Aboriginal and non-Aboriginal perspectives; a practical activity of critical reflection that gradually leads to a critical understanding when approaching "the labyrinth" from different perspectives. This is the type of "surveying" that should guide FPIC processes, in order to map the similarities and differences necessary for consensual decision making.[410]

III.2.4.3 Conclusions: Dialogue and Diversity in Multi-Nation States

Concluding, Tully argued that negotiations in the context of cultural struggles for recognition need to adhere to three principles. These principles - mutual recognition, consent and continuity - also are vital for the successful implementation of self-determination derived rights for indigenous peoples.

The aspectival character of the intercultural dialogue needed is not grasped by a comprehensive representation, but by participation in a practical dialogue, or better: a multilogue. They preserve legal and cultural plurality, and consist of a diversity of criss-crossing contested narratives through which citizens participate in and identify with their association. Constitutions, like self-determination or FPIC arrangements are not fixed and unchangeable agreements, but chains of continual intercultural negotiations in accord and discord with the conventions of mutual recognition, continuity and consent.[411]

Wittgenstein's arguments point out that there is no single comprehensive model appropriate for accommodating the diverse claims to cultural recognition, whereas the domain of human action is aspectival. Instead of a grand theory,

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[408] Tully, 1995, p. 135,

[409] Tully's scheme of continuous renegotiation and revision exposes an important issue in FPIC processes: How to ensure decision making with "due care" while remaining effective?

[410] In the next paragraph on "freedom" Philip Pettit's idea of "freedom as discursive control" will be explained to further elaborate upon the requirements for FPIC processes.

[411] Tully, 1995, p. 184 ff. Contemporary constitutionalism includes common constitutionalism and modern constitutionalism trimmed of its features that violate the three conventions. Contemporary constitutionalism is seen as 'just' because it rests on the three conventions, being those that 'survived' the critical survey of 'Strange Multiplicity'. Moreover, it furthers the liberty of self-rule, or self-determination.

constitutional knowledge appears to be a humble and practical dialogue.[412] This is also the way in which indigenous peoples demands for recognition (for instance in FPIC processes) are to be approached.

Progress in contemporary constitutionalism is not the move towards uniformity, but rather it consists in learning to recognize, converse with, and accommodate present day diversity. Its value lies in *continuing* the overlapping, interacting, and contested cultures we have.[413]

The assumption that general terms of constitutional language can be applied identically in each instance leads to an insistence upon a uniformity that the aspectival and diverse constitutional phenomena of real life just do not represent.[414]

A Normative Framework for Indigenous Self-determination and Participation Rights

Without a political climate that is susceptible to indigenous demands for self-determination and participation rights, FPIC cannot become an effective concept.[415] Tully argued how and why these self-rule claims for indigenous peoples could fit well within the constitutional framework of the state; how they can become acceptable in constitutional practice.[416] An important barrier to implementation of FPIC is the lack of political will on the part of states to enshrine FPIC in national legislation.

Tully's account explains why and how room should be made for different forms of self-determination, within the framework of the state. Self-determination – the power to choose one's own pace and path of development – is to be achieved largely through fair participation in decision-making processes that affect indigenous peoples, as was argued before.

This politics of recognition leaves space on the national level for the accommodation of claims to culturally differentiated rights. Tully convincingly argues that a *multilogue* within and across cultures provides a way of understanding which does not entail thinking that one can comprehend what others say within one's own language. This is the way understanding occurs in the real world of overlapping, interacting, and internally negotiated cultures. This insight is extremely important for understanding a concept of FPIC, where it reveals that both externally and internally, there - necessarily - ought to be room for dialogue and dissent. Moreover, we should not look for one

412 Tully, 1995, p. 185. An important argument in this study is that FPIC processes should not be seen as entailing a single comprehensive standard, but as flexible procedures, with different implications in different contexts, 'a gliding scale'.
413 Continuity is, as was discussed earlier in the paragraphs on self-determination, also a central theme in the contemporary global indigenous peoples movement; recognition of cultural identity and self-determination instead of progressive integration into 'main-stream society'.
414 Tully, 1995, p. 199.
415 The legal and other cases explored later on in this study, exemplify this statement.
416 Refer to constitutional recognition of indigenous peoples in Latin America.

comprehensive explanation or definition of FPIC, considering the wide variety of cultural contexts in which it is applicable.

The survey of encounters with non-European cultures, and common law and international law application, lead Tully to extract three essential principles: mutual recognition, continuity, and consent. These are norms of justification, which can be engaged and criticized from a multiplicity of vantage points.[417] These conventions do not presuppose a comprehensive form of dialogue, nor a single way of participating in such a dialogue. Accommodation of cultural diversity consists in the negotiation and mediation of claims to recognition in a dialogue governed by the three conventions.[418] Vital for this study, these three principles are also the basis for the legal model developed mainly in the context of the Inter-American Human Rights system, and subsequent paragraphs will illustrate the importance of recognition, consent and continuity when trying to establish a fair legal model for indigenous land, resource and self-determination rights.

Tully's framework emphasizes the need for a flexible interpretation of self-rule standards. Especially the procedure itself should be open to re-negotiation. Searching for a fixed, uniform standard for FPIC and effective participation processes is neither realistic nor desirable. What is needed, is an intercultural dialogue in which the culturally distinct ways of speaking and acting are mutually recognized, in order to reach agreement on the type of self-rule arrangements that fit the particular situation and cultural context. It is through and in this dialogue that people and peoples are to recognize each other's similarities and differences and by this process of mediation discover common ground and reach agreement on appropriate types of self-rule.

Tully illustrated the central importance of a principle of self-determination for indigenous peoples that works within the framework of the state, provides powerful arguments for national recognition of indigenous peoples and forms of participation in the state that recognize cultural differences and appropriate forms of self-rule.

Furthermore, he explained what kind of framework is necessary for implementing such self-rule structures: an intercultural dialogue guided by principles of mutual recognition, continuity, and consent. These are essential preconditions for making FPIC work. Without a situation of mutual respect and trust between indigenous peoples and states, and without a dialogue in which

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417 Ivison D, 'Does The Spirit of Haidi Gwaii Fly Only at Dusk?', 1 Theory & Event, at 4, 1997.

418 Tully, 1995, p. 210-212. A 'just peace', in Tully's opinion, is always a 'mediated' peace. The Chief of the Canoe 'Spirit of Haida Gwaii' that served as the metaphor for Tully's theory, is in the last sentence of the book, revealed to be the mediator: this appears to be the State. Tully's study also entails a model for both non-aboriginal and aboriginal people to map their similarities and differences, and to 'mediate' between peoples. International forums and platforms may perform such a mediating task, and provide discursive space. The 'common law like' system of reasoning in international adjudication is in line with what Tully requires for a fair intercultural dialogue. These international platforms will be discussed at length in part IV, 'Platforms'

indigenous voices are heard, effective participation is impossible to realize. Consequently, without such an intercultural dialogue, FPIC can never become a successful tool; an effective instrument to solve the problems indigenous communities face when confronted with powerful actors in decision-making processes that affect them.

III.3 Free, Prior and Informed Consent

After having explored the importance and status of effective participation for indigenous peoples, the next paragraphs will examine the connected concept of FPIC - in particular its different elements - more closely. It will be illustrated that it is vital to secure that consent – when given – is provided in a way that qualifies as "free and informed." The following paragraphs will focus on what these two requirements could entail, and why they matter so much. A shorter paragraph will be devoted to the requirement that consent has to be provided "prior" to any decision.

But, as a vantage point for the remainder of Part III, this paragraph will firstly describe the current understanding of the different elements of FPIC. The most widely cited and elaborate document in which these different elements are explained is the report of the 2005 UNPFII Workshop on FPIC.[419]

The 2005 Workshop on FPIC

In 2004, the Inter-Agency Support Group on Indigenous Issues[420] published its report on free, prior and informed consent at the Third session of the UNPFII, in which it put forth a questionnaire to 18 UN Agencies.[421] The main outcomes of the report stated that although no formal definition of FPIC was present within the UN agencies, they all recognized the principle as being embedded within the human rights framework. Meaningful participation and consultation were regarded as essential for implementing FPIC.

Subsequently, in February 2005, the Permanent Forum on Indigenous Issues published its report on the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, held in New York in January of that year.[422] The Workshop was attended by 67 observers and

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[419] E/C.19/2005/3, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 17 February 2005, presented at the Fourth session of the United Nations Permanent Forum on Indigenous Issues, New York, 16-27 May 2005.

[420] The Inter-Agency Support Group (IASG) was established to support and promote the mandate of the UN Permanent Forum on Indigenous Issues within the United Nations system. *See:* http://undesadspd.org/IndigenousPeoples/InterAgencySupportGroup.aspx.

[421] Inter-Agency Support Group on Indigenous Issues, report on free, prior and informed consent, Permanent Forum on Indigenous Issues, Third session, New York, 10-21 May 2004, E/C.19/2004/11.

[422] E/C.19/2005/3, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 17 February 2005, presented at the

experts from Governments, indigenous organizations, United Nations, and other intergovernmental organizations. The report and its accompanying documents still contain the most comprehensive elaboration on the elements of FPIC seen in light of the UNDRIP and will therefore be discussed next.

The principle of free, prior and informed consent was recognized as one of the core methodological challenges concerning the protection of indigenous peoples at the Permanent Forum's first, second, and third sessions. In accordance with ECOSOC decision 2004/287,[423] which authorized the Workshop, the Permanent Forum's secretariat organized a three-day session, in which United Nations and other intergovernmental organizations representatives,[424] indigenous organizations' experts, interested state representatives, and members of the Permanent Forum participated.[425] The workshop's conclusions and recommendations somewhat cautiously stated that progress was made in establishing a more common understanding of the FPIC.

Workshop's Conclusions and Recommendations

The overall opinion was that FPIC was integral to the exercise of the right to self-determination and essential in effectively protecting indigenous peoples' rights to land, territories, and resources.[426]

FPIC is described as an evolving principle that should be adaptable to different realities. The principle was identified as: "a process that could possibly lead towards equitable solutions and evolutionary development which may lead, in their turn, to co-management and decision-making."[427] This rather cautious

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Fourth session of the United Nations Permanent Forum on Indigenous Issues, New York, 16-27 May 2005.

423 ECOSOC decision 2004/287, 49th Plenary Meeting, 22 July 2004.

424 The UN and other intergovernmental organisation participating in the Workshop were: Division for the Advancement of Women of the United Nations Secretariat, Department of Political Affairs of the United Nations Secretariat, Department of Public Information of the United Nations Secretariat, Department of Economic and Social Affairs of the United Nations Secretariat, European Community, Food and Agriculture Organization of the United Nations (FAO), Inter-American Development Bank (IADB), International Fund for Agricultural Development (IFAD), International Labour Organization (ILO), Office of the United Nations High Commissioner for Human Rights, secretariat of the Convention on Biological Diversity, secretariat of the United Nations Forum on Forests, United Nations Development Programme (UNDP), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Children's Fund (UNICEF), United Nations Development Fund for Women (UNIFEM), United Nations Working Group on Indigenous Populations, World Health Organization (WHO), World Intellectual Property Organization (WIPO) and the World Bank Group.

425 E/C.19/2005/3, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 17 February 2005, presented at the Fourth session of the United Nations Permanent Forum on Indigenous Issues, New York, 16-27 May 2005, (E/C.19/2005/3), page 3.

426 E/C.19/2005/3, page 10.

427 E/C.19/2005/3, paragraph 42.

approach towards FPIC, however, does not seem to explicitly preclude any requirement of full consent. Nevertheless, the statement does not expressly declare that in some cases, FPIC can be regarded as a "right to say no." The indigenous participants at the workshop did believe that any given process of free, prior and informed consent could result in a narrow understanding of "consent or non-consent." In turn, such an outcome should not be considered as a good or a bad result, as long as appropriate mechanisms were in place.[428]

The Workshop's report noted that legal norms and methodologies regarding FPIC have been practiced and should continue to be practiced in order to: "build a culture of respect and mutual understanding in the relations between indigenous peoples, states, intergovernmental organizations and the private sector in development projects that affect indigenous peoples' land, territories, resources and their ways of life."[429] As noticed in paragraph III.2.2 concerning the participatory provision in the UN Declaration, the focus on a "spirit of co-operation" is invaluable in creating effective participatory mechanisms for the protection of indigenous peoples' rights.

The Workshop report identified the main areas in which FPIC is relevant. Amongst others, and in line with what was argued in Part II of this study, the principle is important with respect to indigenous lands and territories, treaties and agreements with the states and other actors, development projects, policies and legislation affecting indigenous peoples, and in relation to United Nations and other intergovernmental organizations dealing with indigenous issues.[430] FPIC thus appears to be an important principle aimed at guiding the decision-making processes of in a wide range of issues related to indigenous peoples.

The most important outcome of the Workshop is enshrined in its conclusions on the "*elements of a common understanding of free, prior and informed consent,*" in which the different elements of the principle are defined by the leading opinion of the participants. According to the report, these elements "emerge towards a common practical understanding of free, prior and informed consent" based on international and national policies, jurisprudence and practices.[431] In dissecting the principle, the Workshop report concluded that:

1. **Free** should imply no coercion, intimidation or manipulation.

2. **Prior** should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.

3. **Informed** should imply that information is provided that covers (at least) the following aspects:

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[428] E/C.19/2005/3, paragraph 42.
[429] E/C.19/2005/3, paragraph 43.
[430] E/C.19/2005/3, paragraph 45.
[431] E/C.19/2005/3, paragraph 44 and 46.

a. The nature, size, pace, reversibility and scope of any proposed project or activity;
b. The reason(s) for or purpose(s) of the project and/or activity;
c. The duration of the above;
d. The locality of areas that will be affected;
e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;
f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);
g. Procedures that the project may entail.[432]

In line with what was discussed above, consultation in good faith and participation are seen as the most crucial components of a consent process. The focus should be on the establishment of a dialogue in an atmosphere of mutual respect with full and equitable participation.[433] Another implicit reference to self-determination is made by stating that indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions, thereby underlining the importance of taking into account indigenous law in participatory processes. As will be illustrated in Part V, the Inter-American human rights entities attempted to clarify these requirements.

Finally, the concluding remarks regarding consent state that: "This process may include the option of withholding consent,"[434] thereby neither confirming nor denying the existence of a collective "right to say no." The possibility of such a narrow conception of "consent," however, is definitely not excluded.

The elements of a common understanding of FPIC, stated in the January 2005 Workshop report and reaffirmed in the August 2005 Workshop report, can be seen as the most comprehensive elaboration on the principle of FPIC. The emphasis is on a consent-process, meaningful participation, and consultation.[435]

The following paragraphs will explore these different elements of FPIC more in-depth. First, it is examined how the requirement "free" is best understood in the context of FPIC processes. As will be shown, Philip Pettit's account of interpersonal freedom as discursive control offers an attractive perspective in this light. Next, some remarks on the prior requirements will be

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[432] E/C.19/2005/3, paragraph 46.
[433] E/C.19/2005/3, paragraph 47. This is in line with what was discussed at length in the paragraph on effective participation and specifically with the paragraph that examined the concept in light of James Tully's description of an intercultural dialogue.
[434] E/C.19/2005/3, paragraph 47.
[435] For more recent work, reiterating most of the viewpoints developed during the workshop, see e.g.: Doyle C and Cariño J, 'Making Free Prior and Informed Consent a Reality, Indigenous Peoples and the Extractive Sector', Middlesex University, 2013.

made. Subsequently, the informed criterion will be examined. In the latter paragraph, a perspective from the field of bioethics will be taken, since it is in this field that informed consent requirements were developed first. This perspective offers a number of relevant insights that explain the complexities involved in "informing". It is argued that informing in the context of FPIC entails complex communicative transactions. A number of standards that are important for successful communicative transactions will be described. Afterwards, some particularly pressing issues related to obtaining FPIC in the context of indigenous peoples will be exposed. Part III ends with a paragraph containing an overview and conclusions.

III.3.1 Free: Discursive Control and Non-Domination

Introduction

As the first step in "dissecting" FPIC, and exploring its different elements, this paragraph will examine what is meant by the requirement "free" in FPIC. When can it be said that an indigenous people makes a free decision? Or when can it be said that a consultation process is conducted in a manner that is "free?" In other words, what sort of capacity can be ascribed to an agent that bears the predicate "free?" Philip Pettit's theory of freedom as discursive control will be examined, since this theory provides an attractive and, importantly, practical way of explaining what the requirement "free" could imply. It will be argued that there are certain specific criteria that we can link to a requirement of freedom, criteria that make it tangible and applicable.

Pettit's account does not only cover *personal* freedom, but also links up with the political freedom, the political ideal that is best upheld by a state in order to guarantee the freedom of, in this study, indigenous peoples. In this way, it is again possible to expose the relation between FPIC and the broader concept of self-determination. This account therefore clarifies what is meant by "to freely determine" in the text of the different provisions on self-determination.

Pettit's account of freedom is very attractive for our purposes, because it defines freedom as an interpersonal, relational concept, something that you experience when interacting with others. This is of course the way "free" in FPIC processes is meant to function.

The two main questions that will be examined in these paragraphs are therefore: What do we mean if we say that an indigenous people "as a whole" is to consent to a certain proposal in a state that can be described as "free?"[436] And

[436] As the Inter-American Commission on Human Rights explained, consent has to be acquired on behalf of the community *as a whole*, whereas this entails at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as a collective. See, IACHR, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R. (2004), October 12 2004, paragraph 142. At a minimum, 'free' requires that consent is given or withheld in the

which political principle should be guiding to secure that indigenous communities are able to "freely determine" their political status and freely pursue their own way of economic, social and cultural development?

III.3.1.1 Personal Freedom and Consent: Discursive Control

Free Agency under Discursive Control Theory: Pettit's Theory of Freedom

It was argued in paragraph II.1 that indigenous self-determination functions as an intra-state concept that requires equal participation of indigenous peoples and that FPIC is a procedural tool aimed at operationalizing indigenous self-determination by means of a targeted approach of integrating indigenous peoples the decision-making processes that affect them.

It was also argued that consent as a procedural justification is in need of strong additional requirements, since it may have profound implications for indigenous communities, taking into account the types of decisions in which it is relevant.[437] In paragraph III.2.4 the type of intercultural dialogue that is needed for appropriate forms of self-rule and the principles that support such a "multilogue" were clarified by exploring Tully's famous work "Strange Multiplicity."

Now it is examined under what kind of perception on freedom an indigenous people can operate in a state that can be described as "free." This question will be answered with the help of Philip Pettit's book "A Theory of Freedom" (2001), in which the author presented a comprehensive theory of freedom that encompasses the area of free will as well as that of political liberty.[438]

The Priority of the Responsibility Connotation: Freedom as Fitness to be Held Responsible

Pettit's core assumption was that there is a single, unequivocal concept of freedom at issue when we speak of freedom in the person, freedom of the self, and freedom of action.[439] Such an account must explain why three connotations of freedom are valid. First, the agent should be held rightly responsible for what he or she did, secondly, an action is only free if it is one that the agent can own

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absence of coercion. See, E/C.19/2005/3, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 17 February 2005, presented at the Fourth session of the United Nations Permanent Forum on Indigenous Issues, New York, 16-27 May 2005. *Also see*, E/CN.4/Sub.2/AC.4/2005/WP.1, Motoc I A,'Standard Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent', UNPFII, 2005. This paragraph will explore this requirement in-depth.

[437] Further elaboration on the need for strong requirements securing the validity of consent agreements is provided in amongst others paragraph III.3.3.

[438] Pettit P, *A Theory of Freedom - From the Psychology to the Politics of Agency* (Oxford University Press, 2001) (Pettit, 2001). Philip Pettit is Laurance S. Rockefeller University Professor of Politics and Human Values at Princeton University, United States.

[439] Pettit, 2001, p. 6.

and identify with, and thirdly, the agent's choice has to be one that is not fully determined yet.[440]

These are called respectively; the responsibility, the ownership and the underdetermination connotation. Pettit prioritized the responsibility connotation, which in his view leads to a satisfying view of the overall area. He argued that any action for which an agent can be held responsible is going to be underdetermined in a significant way and is going to be something that the agent can and must own. So whereas underdetermination and ownership do not necessarily entail responsibility, Pettit argued that the priority should be given to freedom as fitness to be held responsible since there is a certain underdetermination and ownership implied in the very idea of being fit to be held responsible.[441]

These connotations all have their own conundrum or central problem. Underdetermination raises what Pettit calls "the modal problem," which means that for anything to be freely done, the agent must have been able to have done something else instead.[442] In relation to the ownership connotation, the core problem is defined as the first person conundrum. For anything to be done freely it must be the case that the agent is able, and indeed compelled, to see the action as his/her (or their) own. The agent must not be a mere bystander, they must identify with what is done by their hands.[443] The conundrum for the responsibility connotation is that it is recursive in character; it constitutes a procedure that can repeat itself indefinitely. [444]

It is essential that the agent is *fit* to be held responsible, in other words, the agent must be *effectively reactionworthy* for a certain action to be seen as free.[445] Pettit's general idea behind depicting freedom as fitness to be held responsible was that we engage with others in a distinctive manner that involves the spontaneous attribution of responsibility. Consequently, we conceive of freedom as that property of *human beings* and the *actions* performed by them that make such attribution appropriate under the rules of the practice.[446] When the agent is fully reactionworthy, then it is proper to speak of freedom; being free is such that the reaction is appropriate; it is being fit to be held responsible.[447]

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440 Pettit, 2001, p.6.
441 Pettit, 2001, p. 8.
442 Pettit, 2001, p. 9.
443 Pettit, 2001, p. 10.
444 Pettit, 2001, p. 10/11. If an agent is responsible for a certain action, this means that he must be responsible for the particular beliefs and desires that led to such action, and that can only be the case is you can be held responsible for some sort of further factor in your make up, and so on, indefinitely. The recursive nature of responsibility according to Pettit, appears to entail an indefinite regress back along the lines of controlling influences in virtue of which an action is put down to an agent in the first place.
445 Pettit, 2001, p. 12/13.
446 Pettit, 2001, p. 13.
447 Pettit, 2001, p. 12/13. To be fully fit to be held responsible for a certain choice is to be such that no matter what you do, you will fully deserve blame or praise if the action is bad or good.

Intuitively, Pettit argued, you will not be fully free in respect of a *choice*, i.e. it is not sufficiently underdetermined, if you are not aware of A or B, or if your capacity or resources are not present.[448] Furthermore, you will not be a free *self* if you are subject to problems that make it difficult or impossible to claim A or B as something that you did, something that you can fully identify with. Finally, and particularly important for our purposes, you will not be a free *person*, if you are the victim of an unwelcome form of duress, pressure, or coercion.[449] These conditions diminish or excuse someone from being held responsible, and consequently, they infringe upon one's freedom.

Pettit assumed three further conditions for conceiving of freedom as fitness to be held responsible. First, you must count as free to be held responsible prior to choice, secondly, you must be fit in a personalized way - not just according to received social standards, and thirdly, you must be properly free to be held responsible, i.e. not merely fit to be treated as if you are free to be held responsible.[450]

The Main Argument for Conceptualizing Freedom as Fitness to be Held Responsible

Pettit argued that there is an *a priori* connection between freedom and being responsible.[451] The main argument accordingly starts from the intuition that it does not make sense to say that if someone did something freely, they still cannot be held responsible.[452]

Subsequently, while this *a priori* connection will be unsurprising and credible under the approach of freedom as fitness to be held responsible, it remains mysterious under the ownership and underdetermination approaches. Fitness to be held responsible itself is a condition that breaks down into a variety of interconnected constraints; a number of distinguishable circumstances. This way it is possible under this approach to invoke the freedom of an agent in explaining why we hold them responsible.[453]

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448 Pettit, 2001, p. 13.

449 Pettit, 2001, p. 13. Most accounts of the element 'free' in FPIC explain it as a requirement of no coercion. Pettit's account of freedom does not leave room for hostile coercion, as will be argued further on, but does distinguish between friendly and unfriendly forms of coercion. This is important, since FPIC processes virtually always entail some form of coercive action, when offers are being made or rewards promised. It is important to examine what kind of coercive action is or is not allowed.

450 Pettit, 2001, p. 14 – 18. We often treat others 'as if they are fit to be held responsible' because of the effects this may have on their performance, for developmental purposes.

451 A connection that we all understand, without having to seek further evidence in support. Pettit, 2001, p. 18.

452 Pettit, 2001, p. 18-19. Pettit explains that we think of freedom as the "can" which an addressing of "oughts" presupposes. Freedom as such can be seen as "the appropriate addressing of ought." We will be able to recognize that sometimes it is appropriate to address "oughts" to others and that sometimes it is not. We think of freedom as that capacity that makes a difference between such situations.

453 Pettit, 2001, p. 19.

Therefore, Pettit's main idea is that we live and think within the practice of holding one another responsible, which makes it credible to talk of freedom as fitness to be held responsible. It makes it possible to talk about freedom as freedom of action, freedom of the self and freedom in the person.[454]

There are a number of other advantages in seeing freedom as fitness to be held responsible. It clarifies for one why "offers" are generally not seen as diminishing a person's freedom, while "threats" are. Most important for our purposes is that this view on freedom makes it something more than a philosopher's plaything.[455] Since the practice of holding people responsible for certain actions is deeply rooted in human behavior, asserting that fitness to be held responsible is what we mean by "freedom" makes the concept very concrete and tangible. In this way, we can apply it in practical situations in which FPIC is required and to explain what is meant by "free."

Free Agency under Discursive Control Theory

Subsequently, Pettit aimed to show that his theory of freedom as *discursive control* allows us to speak of freedom of action, self and person. Pettit first covered two other theories: the theories of freedom as rational and volitional control. He used Rawls' method of the reflective equilibrium to illustrate that they both have necessary elements for a comprehensive theory of freedom, but that they do not quite suffice.[456] It would be far beyond the scope of this thesis to go into Pettit's argument in full and since our purpose is to find a theory or perception of freedom that is relevant for a better understanding of "free" in FPIC – one that does not allow for a variety of forms of hostile coercion – we will focus on Pettit's argument in relation to freedom in the person under the theory of freedom as discursive control. It is argued that Pettit's notion of discursive control provides an accurate and attractive view on "free" in FPIC. Nevertheless, since rational and volitional control are essential elements in the make-up of freedom as discursive control, we will have to make some remarks about both.

Freedom as Rational Control

The responsibility perspective allows us to think of freedom in purely functional terms, it is conceived as that capacity, whatever it involves in itself, in virtue of which an agent is fit to be held responsible, satisfying the various constraints that

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[454] Pettit, 2001, p. 21. An agent will be a *free person* to the extent that their position in relation to others allows them to choose in such a way that they are fully responsible for what they do, a *free self* to the extent that their relationship to their own psychology allows the same. An *action* is free when it materializes in such a way that allows the agent to count as fully fit to be held responsible. In this way the free person, self and action are fully responsibility-compatible.
[455] Pettit, 2001, pp. 20-22.
[456] Pettit, 2001, pp. 34-35.

that involves.[457] Such a functional characterization poses the question as to what that capacity of freedom involves.[458] This is Pettit's starting point and main question in constructing a theory of freedom.[459]

Freedom as *rational control* takes *free action* as its starting point. Rational control means that an action is free just as far as it is an exercise of rational control or power on the part of the agent. Rational control has two components: firstly, it is action related in the sense that the agent will do whatever is rational in the light of beliefs and desires that are present, and secondly, it is evidence related; the agent has to be disposed to update those beliefs and desires if the obtainment of new information requires so.[460]

Pettit stated that the rational control theory applied to action is subject to the recursive problem. When applied to the free self, rational control theory does not explain how the person can see himself as the author, as the self responsible for what occurs in their psychology. Rational control theory applied to the free person is not inconsistent with hostile coercion. Nevertheless, freedom as rational control is also necessary, since fitness to be held responsible seems to presuppose at least a satisfactory measure of rational control.[461]

Freedom as Volitional Control

The second theory Pettit explored was the theory of freedom as *volitional control*, which is in the first place a theory of the *free self*. A self will be free so far as: "there is nothing about the psychology of the agent in virtue of which they are distanced from what they want or think or do, and have to look on those attitudes as a helpless bystander."[462] Volitional control theory explains that rational control has to be supplemented with volitional control in order to

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457 Pettit, 2001, p. 32.

458 Pettit, 2001, p. 32.

459 Pettit's method is an extension of Rawls' "Reflective Equilibrium," the idea being going back and forth between a general description of the freedom capacity and the intuitions that we have about whether there is freedom present in this or that imagined or actual case, in order to come to a stable equilibrium between the two. Pettit, 2001, pp. 34-35.

460 Pettit, 2001, pp. 34-38. Such action can be construed narrowly as being the actual causal result of desires and beliefs, but according to Pettit it should be construed more broadly, so that such action can also be under the virtual influence of those states.

461 For the argument in full, see: Pettit, 2001, pp. 32-48.

462 The theory of volitional control Pettit describes is the one developed by Harry Frankfurt. The core of Frankfurt's thesis to solve the bystander problem can be summarized as follows. Frankfurt's thesis states that agents are capable of having first and second order desires, and second order desires are those that can only be specified by reference to first order desires. Among those second order desires there *may be a desire* that the agent is *effectively moved* by a certain first order desire. Such second order desires are characterised as *second order volitions*. To the extent that agents act according to these second order volitions, they can identify fully with it, see the action as one of their own making, and avoid the bystander problem. Pettit argues that the bystander problem is not avoided in Frankfurt's theory, since these second order volitions can be subject to the very problem it tries to solve. See Pettit, 2001, pp. 50-51.

constitute fitness to be held responsible and subsequently freedom. Rational control itself is not sufficient to pass this bystander problem.[463]

In relation to the theory of volitional control regarding freedom of action and freedom in the person, Pettit explained that it is subject to the same problems as the theory of rational control. That the action must be rationally controlled by rationally held beliefs and desires that conform to the volitional requirement – and the desires are those that the agent wants to be effective – is subject to the problem of recursiveness.[464]

That agents will be free persons so far as their relations are consistent with their being free selves, i.e. are consistent with their enjoying rational-cum-volitional control of what they do, again does not exclude the possibility of hostile coercion.[465] Nevertheless, volitional control is also a necessary element in any conception of freedom; if there are higher order volitions in place, they must play a controlling role.[466]

Rational and Volitional Control and Coercion

It is argued that both the theories of rational and volitional control are necessary but not sufficient for a theory of freedom as fitness to be held responsible. Subsequently Pettit constructed an addition to these theories, and argued that a theory of freedom as discursive control enriches the theories of volitional and rational control in such a way that we can think of freedom as inconsistent with different forms of hostile coercion. We can now turn to this – for our purposes highly relevant – step in Pettit's conception of freedom.

What do we mean by coercion? People are coerced when they are subject to threats of penalty in the event of taking or not taking something that is currently available as an option.[467] People are coerced, in a *hostile* way, when the threats are not dictated by the avowed or at least the avowable (ready to be avowed) interests of the coercee.[468] Because the agent does retain original choice, people who are coerced are still in a position to exercise rational and also volitional control; i.e. they are in a position where they can act in a way that answers to the beliefs and desires relevant to the situation and, in particular,

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463 Pettit, 2001, p. 49.
464 Pettit, 2001, pp. 58-60.
465 Pettit, 2001, pp. 61-62.
466 Pettit, 2001, p. 63. Certain "higher order desires" can be seen as "volitions proper" when two conditions are fulfilled. First, they are desires to be effectively moved by lower level desires. Secondly these second order volitions must bear the agent's active stamp of approval.
467 Pettit, 2001, p. 61.
468 Pettit, 2001, p. 61. Pettit uses the example of Ulysses, tied to the mast of his boat, coerced by his fellow shipmen to remain tied up so he could listen to the song of the sirens. In this case, the coercive action was in line with the avowed interests of Ulysses. That the interests of the coersee, do not necessarily have to be already avowed but can also be 'ready to be avowed' is evident, since new interests may become clear in the process of interaction.

where they can act in fidelity to their higher-order desires as to what lower order desires should effectively move them.[469]

So how does the theory of freedom as discursive control counter this problem? How can an agent be free in such a manner that leaves no space for hostile coercion, and what kind of coercive action does preserve freedom? These questions are of vital importance in FPIC processes because if consent is not given freely, it is useless. Pettit's account of freedom as discursive control pinpoints exactly those issues that have to be taken into account in FPIC processes in order to safeguard the freedom of indigenous peoples.

Freedom as Discursive Control

While it is impossible and beyond the scope of this study to present Pettit's arguments from his compact but dense book in full, the most important elements of his view on freedom as *discursive control* will be explored. It will become clear that this view is very attractive to serve as a way to perceive the element of "free" in FPIC since it requires that indigenous groups must enjoy discursive control in decision-making processes process to preserve their freedom. Furthermore, it also allows for a distinction between a number of coercive actions that may or may not jeopardize "freedom."

Discursive control theory starts from a perception of freedom in the *person*. The theory of the free person (abstracted from environmental freedom) relates to the standing that an agent must have *among other persons* if he or she is to be regarded as free in the choices they make.[470] This *relational* aspect is most important for the situation we describe; that of an indigenous people acting freely in relation to the state or other agent,[471] involved with obtaining consent. Such an interpersonal relation is most prominent within the process of FPIC; it necessarily involves different agents in a "dialogical" process. Therefore, the focus will be on the discursive control conception of freedom as it bears on the free person.

As indicated above, a richer conception of freedom as fitness to be held responsible is needed - in addition to the theories of rational and volitional control - if it is to rule out, not just the obstruction of choice, but also a myriad of other coercive and quasi-coercive ways in which people may intrude upon a person or hinder them.[472]

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469 Pettit, 2001, p. 61. *e.g.* when a robber threatens you with a physical beating if you don't hand over your money, you retain rational and volitional control in handing over your wallet. Analogous examples with regard to indigenous peoples can easily be imagined.

470 Pettit, 2001, p. 65. Pettit's theory is about 'freedom in the agent' by which he amongst others tries to make clear that it abstracts from dealing with environmental constraints that may infringe upon one's freedom, like for instance a constraining social system or harsh natural circumstances. In the part on political freedom these environmental considerations do play a role, where the principle of non-domination also requires that the state does what it can to reduce these environmental constraints.

471 FPIC operates on different levels; local, national, regional and international.

472 Pettit, 2001, p. 66.

Discursive Interaction

Pettit asked: Does any relationship mean that those involved, the influenced as much as the influential, retain a full and equal title to be held responsible? His answer is affirmative. According to Pettit this is the interaction that occurs when people attempt to resolve a common discursive problem by common discursive means.[473]

To discourse is to reason, in dialogue with others, which implies the recognition of a *common problem*. To discourse, in this sense, refers to a method of taking turns with the aim of solving a problem by reference to what all parties regard as inferentially relevant considerations or reasons.[474] While there are many views on practical discourse, there is no doubt about the fact that such discourse may solve a large number of problems.[475] Moreover, when a problem is recognized as a common problem, the next step is to search for the relevant considerations for its resolution. Subsequently, it is often possible to agree upon such a resolution when it is supported by those relevant considerations.[476]

There are two ways in which this form of discursive interaction takes place: first, in a discourse-friendly manner and secondly, in a discourse-unfriendly manner.[477] Pettit argued that relationships are discourse-friendly when they do not obstruct, endanger, or limit discursive influence between parties. They have to be relationships that allow people to exercise discursive influence over each other.[478] Such associations do not allow for influences of the kind that would undermine discursive influence; they would run counter to the spirit of the relationship.[479]

Discursive Control

Pettit's central claim was that discourse-friendly relationships preserve a person's freedom. We see such relationships as those in which we each undergo the influence of others but not in a way that compromises our fitness to be held responsible and our freedom among other persons.[480]

So, in the theory of freedom as discursive control, being a free person will *naturally* be identified with the form of control that people enjoy within discourse-friendly relationships, and this is fully consistent with someone

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[473] As was explained in the previous paragraphs on Tully's intercultural dialogue, FPIC in such a sense can never be one-sided, it is a meditative process in which mutual consent and recognition are required.
[474] Pettit, 2001, p. 67.
[475] Pettit, 2001, p. 67.
[476] Pettit, 2001, p. 67.
[477] Pettit, 2001, p. 69.
[478] Pettit, 2001, p. 69.
[479] Pettit, 2001, p. 69. *Cf.* the preamble to the UN Declaration on the Rights of Indigenous Peoples.
[480] Pettit, 2001, p. 70.

undergoing the discursive influence of others.[481] This is of course the ideal situation of how FPIC processes are to be shaped; at best they should entail full discursive control for the indigenous communities involved.

Pettit explained that discursive control in this way has a *ratiocinative* and a *relational* aspect; i.e. the ratiocinative capacity to take part in discourse and a relational capacity that goes with enjoying relationships that are discourse-friendly.[482]

It is essential for discursive control that the person is authorized as a discursive partner and publicly recognized as a locus of discursive authority.[483] Indigenous peoples' struggle for recognition, reflected in the Declaration, is aimed at recognition of a process of participation in a spirit of cooperation and mutual respect, in other words; at obtaining discursive control in the decision-making processes that affect them.

Pettit agreed that incorporation of an agent in a dialogue will establish the sure and secure position of the relational capacity associated with discursive control. He contends that there will be no case of second-class treatment when the person is appropriately incorporated in discourse.[484]

In short, agents will be free persons to the extent that they have the ratiocinative capacity for discourse and the relational capacity that goes with enjoying discourse-friendly linkages with others. That capacity – with its dual aspects – is what constitutes discursive control. Agents will exercise such freedom as persons as far as they are engaged in discourse with others, being authorized as someone worthy of address, and they will be reinforced in that freedom so far as they are publicly recognized as having the discursive control it involves.[485]

Discursive control, and recognition that you are entitled to this, is therefore what is required by the element "free" in FPIC processes. And there are a number of different ways in which this type of freedom can be compromised.

Discursive Control and Coercion

Pettit argued that under the theories of rational and volitional control the agent retains these forms of control even in cases where others coerce them by threatening some penalty if they go in a certain way. However, the relationship with the coercer does not allow an agent, the coercee, to be seen as fit to be

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481 Pettit, 2001, p. 70.

482 Pettit, 2001, pp. 70-71. The relational capacity involves two complexities: firstly that a relational capacity cannot exist without the occurrence of some interactions with others. The capacity presupposes that those relationships are actually in place. The second complexity is that discursive control in its relational aspect strengthens the ratiocinative control by exercise.

483 Pettit, 2001, p. 72.

484 *Cf.* Taylor C, 'The Politics of Recognition' in Amy Gutmann, *Multiculturalism, Examining the Politics of Recognition* (Princeton University Press, Princeton, 1995). Also see Paragraph III.2.4 on the type of intercultural dialogue that is needed to respect cultural diversity in multi-nation states.

485 Pettit, 2001, p. 73.

held responsible, and subsequently, not as properly free.[486] This is vital for understanding what "free" in FPIC entails since it is the goal of this requirement to prevent indigenous peoples from being coerced into certain actions in an unfriendly manner. However, there are a number of different ways in which coercion may occur – and will occur in the processes in which FPIC is required - and some may restrict freedom, while others do not.

Discursive control requires in addition to the ratiocinative power – the psychological capacity for discursive interaction - that others not try to influence them in a discourse unfriendly manner.[487] This rules out all interventions by others that restrict, undermine, or jeopardize discourse, and hostile coercion will count as one of those.[488]

Hostile coercion is therefore unfriendly to discourse, since it inevitably transforms the relationship between the parties involved in such a way that the range of discursive interaction is restricted. A coercive threat places limits on how far discourse is to guide our interaction, and therefore coercion is not compatible with a theory of freedom as discursive control.[489]

However, there are a number of ways in which one may be "coerced" that do not restrict a person's discursive control and which are allowed. For instance, it may be possible that a "plea" or a "bid" is made in which new discursive considerations are put on the table, or a contractual "bid" is made that influences the parties. These do not pose a coercive threat.[490] There is also the possibility that a certain reward is promised in the form of an "offer." If this does not turn into bribery – Pettit argued that it should be made out of considerations for your avowable interests – this is also consistent with preserving discursive control.[491]

These types of action are therefore allowed in discourse; they do not diminish the discursive control of the parties, where hostile forms of coercion will. Friendly coercion, and more broadly, any form of friendly interference, is therefore consistent with discursive control as long as is it guided by the coercee's avowable interests.[492] This way, the coercee remains fully responsible for what happens.[493]

The theory of discursive control leaves no space for thinking that hostile coercion is compatible with someone being regarded as a free person. Pettit completed his theory by pointing out that under discursive control an agent can count as a free self, when they own or endorse a large part of the legacy they inherit from their accumulating personal history, and succeed in living up to this

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[486] Pettit, 2001, p. 73.
[487] Pettit, 2001, p. 73.
[488] Pettit, 2001, p. 73.
[489] Pettit, 2001, p. 74.
[490] Pettit, 2001, p. 74.
[491] Pettit, 2001, p. 75.
[492] Pettit, 2001, p. 76. Those interests are the discursive considerations that are intuitively relevant to what should happen.
[493] Pettit, 2001, p. 76.

legacy so that the self will be neither weak nor elusive.[494] An action under this theory counts as free as long as it is discursively controlled – in a virtual or actual mode – and is consistent with the freedom of the person and the freedom of the self.[495]

This way, it is exposed that hostile coercion is inconsistent with freedom as fitness to be held responsible under the theory of discursive control. Since the theory this far focused primarily on individual agents, and we are dealing with a collective subject (an indigenous people, that is to act in a state that can be depicted as free) Pettit's complex argument that states that the theory of discursive control allows for an extension towards collective agents, will be briefly inspected.

Collective Agency and Discursive Control

Pettit stated that everything so far said about the individual agent applies in a parallel way to the collective agents that individuals often constitute.[496] It is, however, a particular collective subject that can enjoy freedom of self, person, and action; something that Pettit called "social integrates." Such collective subjects are fit to be held responsible, just as individuals, so far as they enjoy discursive control.[497]

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494 Pettit, 2001, pp. 79-90.
495 Pettit, 2001, pp. 90-102.
496 Pettit, 2001, p. 104
497 *See*, Pettit P, 'Groups with Minds of Their Own', in: Schmitt F (ed.), *Socializing Methaphysics* (New York: Rowman and Littlefield, 2003). *Also see*, Pettit, 2001, Chapter 5. Pettit's argument starts from what he describes as the discursive dilemma. It is beyond the scope of this study to cover the argument in full, but the core reasoning will be mentioned. The dilemma illustrates that whenever groups have to make a judgement following from a particular set of premises, it faces a hard choice between adopting a conclusion based and a premise based approach. If the group adopts a conclusion based approach, and thereby individualizes reason, the possibility exists that the group itself will not satisfy reason, since the individual votes on the different premises could suggest a different outcome. The other way is that the group forms a collective premise-based judgment, which theoretically might not support the individual conclusions. Pettit argues that this second method of collectivizing reason is almost inevitably the method to follow for purposive groups. His argument is summarized as follows. Any group in the pursuit of an assumed purpose will generate a history of (recorded) judgements that constrain the judgments that groups ought to make in present and future decisions. This way, the group will over time find itself confronted with the discursive dilemma, and face the choice between individualizing and collectivizing reason. Since groups do not effectively promote their assumed purpose if it reasons inconsistently and will need to become an effective promoter of this purpose, it will be forced to collectivize reason. Since the group will not be considered an effective promoter of its purpose if it frequently renounces past commitments, that should be avoided and those judgements that are required in consistency and coherence of past commitments should be taken. The discursive dilemma also illustrates that collective intentions can run counter to individual intentions of the group members. According to Pettit, this discontinuity claim "vindicates in the most compelling way possible that there are indeed collective subjects and agents."

Pettit portrays groups that collectivize reason as social integrates (as opposed to social aggregates) in order to emphasize the fact that the collectivity involved integrates members into collective patterns of judgment and decision that respect the demands of reason at the collective level.[498] Such social integrates may take on a variety of decision-making methods, can extend over a long or short period of time, may change or fix their membership patterns, and so forth.[499]

These social integrates are intentional and personal subjects as far as they pursue certain goals as a collective,[500] and satisfy two further conditions; firstly, they display a certain rational unity in the sense that there must be a basis in the behavior of participating members for ascribing judgments and intentions and such attitudes to the collective, and secondly, there must also be a basis for thinking of the collectivity as a subject that is rationally unified in such a way that within feasible limits and under favorable conditions, we can expect it to live up to the constraints of rationality.[501]

The theory of freedom illustrates that agents count as free – i.e. fit to be held responsible – because of how their actions materialize, their self operates, and their person relates to others. So a collective agent, a social integrate, can only count as free as long as it is a centre of personhood, selfhood, and action.

Social integrates can be persons in their own right and have the first person plural point of view that is essential in ascribing self-hood to an agent. Collective agents can engage in dialogue with individuals as well as with each other, as they are capable of being held to an expanding record of commitments in the judgments they make and the intentions they form. Similar to the individual agent, social integrates will prove to be the same institutional person at a certain moment in time compared to an earlier moment, just as far as the latter agent can be held answerable – under discursive standards – for the judgments and actions of the former. And it will be the same self over time, just as in the individual case, to the degree that it still owns or endorses the judgments, intentions, and actions of the former. That we usually do not talk of a collective self, Pettit argued, is not subject to any incoherence in the idea, but has more to do with the fact that we usually mean living, breathing individuals when we speak of a "self."[502]

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498 Pettit, 2001, pp. 110-114.

499 Pettit, 2001, p. 114

500 *See*, Pettit P, 'Rawls's Peoples', in Rex Martin and David Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia* (Blackwell, Oxford, 2006), pp. 38-56. *Also see*, Pettit, 2001, pp. 114–115.

501 Pettit P, 'Groups with Minds of Their Own', in: Schmitt F (ed.), *Socializing Methaphysics* (New York: Rowman and Littlefield, 2003), p. 17.

502 Pettit, 2001, pp. 118–123. Pettit started this endeavour by observing that collective agents can certainly be regarded sources of intentional action, since the discursive dilemma illustrates that they can form intentions discontinuously from the intentions of their members. But can they be ascribed personhood as well; i.e. can collective agents count as persons and selves? According to Pettit, there is no problem with this; where there is a personal perspective that is only available when we talk of "I," so is there such a perspective apparent when we talk of "we."

These social integrates can be free in the same way that the individual agent can exercise freedom.[503] The agent will be a free person to the extent that it enjoys discourse friendly relationships with other persons. It will be a free self, as far as the self is not elusive or weak in the sense that it does not see itself as a mere bystander and is capable of sustaining the commitments it owns.[504] And thirdly, the agent's action will be free if it materializes under discursive control.[505] There is thus nothing inconsistent with groups, like indigenous peoples, acting freely – fit to be held responsible – under discursive control theory.

III.3.1.2 Political Freedom and Self-Determination: Non-Domination

Politicization and Democratization of Freedom

So far, it was argued that an agent can be free on the level of self, person, and action under Pettit's theory of discursive control and it was concluded that discursive control is the best way to perceive "free" in FPIC, especially as it bears on personal freedom – freedom as it is experienced in relation to others in discursive interaction. Discursive control is above all a relational principle, and it explains why hostile coercion may diminish an agent's freedom, while a number of other influences may not.

Subsequently we examined how a collective agent can enjoy freedom, since we are dealing with an indigenous people as a whole. As far as indigenous peoples count as social integrates – not just aggregates – such collective agents have the same capacity for freedom as individual agents have. These social integrates furthermore need to collectivize reason and have a common purpose over time.

Now it will be explored what kind of political principle is best suited to safeguard indigenous peoples' right to self-determination. It was illustrated that indigenous self-determination is not a right to secession or independence, but that it can – and should – be regarded as an intra-state concept that is primarily a participatory principle that aims to give indigenous peoples the determinative voice in how and at which pace their social, economic and cultural development is to take place.

When we depict such a perception on indigenous self-determination, this implies that the state – the larger political order – has to be susceptible to such a

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503 Pettit, 2001, p. 119. While there are many similarities between individual human beings and social integrates, Pettit stresses that there are of course many differences as well. The groups form collective minds only on a restricted range of matters that are bound to the collective purposes of that particular collective agent. Pettit states that the most natural way to think of them is as agents to which individuals give life by now and then suspending their own projects or individual interests, in order to serve the collective goal. The group as such is a purely artificial form of life that remains dependent on the continuing compliance of the individuals that make it up.

504 Pettit, 2001, p .120.

505 Pettit, 2001, p. 103. This may be in "active" or "virtual" mode. For the argument, see Pettit 2001, pp. 90-102.

concept. In the previous paragraph, we already explored this question in relation to what kind of constitutional negotiations are just in respect of cultural diversity. The state structure has to be disposed to integrate demands for self-determination and corollary participation rights into its democratic fabric.

Pettit explored a similar question, which will help to uncover what is meant by "freely determine" in the legal definition of self-determination.[506] In this final section, we will first examine what kind of *political ideal* the state should adopt in order to be an active promoter of - indigenous - equality. Secondly, we will look into the *democratic structure* such a state should cherish, and illustrate that electoral democracy alone is not enough for facilitating a fair system that constrains state nation building and accommodates a multi-nation state in which different cultures are allowed to flourish at a level of equal recognition.[507]

The Political Ideal of Non-Domination

Pettit argued that the state is a particular collective agent, since it has the power of coercion and does not, generally, grant its inhabitants a right of exit. Therefore, the republican ideal of *non-domination* is the political ideal that should be preferred above the ideals of non-limitation and non-interference.[508] Here it is possible to distinguish how Pettit connected the areas of "free will" and "political liberty" that started to become clear when personal freedom as discursive control was discussed.

Pettit argued that psychological freedom of the person connects directly with political concerns, once we take freedom of the person, under the theory of discursive control, to involve a social power in relation to others, not just a psychological capacity.[509] As stated before, this relational perspective is also the one that is essential to understand indigenous peoples' claims to self-determination and FPIC.

Pettit explained that the political ideal of freedom is that the polity or state should do what it can to enable its members to enjoy freedom. The main question in this section is: which ideal of liberty could be guiding taking into account the idea of freedom as discursive control?[510]

Other than a division into positive and negative liberty, Pettit conceived of three contesting ideals. First, there is the ideal of freedom as non-limitation, secondly, freedom as non-interference, and thirdly, freedom as non-domination.

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506 Pettit, 2001, Chapter 6.
507 Pettit, 2001, Chapter 7.
508 Pettit, 2001, Chapter 6.
509 Pettit, 2001, p. 125.
510 Pettit, 2001, pp. 126-128. Pettit argues that discursive control itself is difficult to serve as this ideal, since the State is a particular collective entity. Pettit explains that discursive control does not suffice as the guiding principle for the State, firstly, since it applies to both groups and individuals, secondly, since discursive control is associated with variables in individual psychology that are better insulated from the concerns of the state, since it is unlikely that the state can do anything on the intrapersonal front; and thirdly, the concerns of the state should be related to both agency and environment; i.e on interpersonal and impersonal levels.

Pettit rejected freedom as non-limitation and non-interference and favored the ideal of freedom as non-domination.[511] The ideal of non-domination is of course a central theme in the discourse on the protection of indigenous peoples.[512]

Freedom as *non-limitation* entails that the state is equally concerned with removing impersonal and more or less intentional interpersonal limitations. In that way it does not make a distinction between compromising and conditioning liberty.[513]

Non-interference tries to counter this problem and entails that intentional, and quasi intentional, interference compromises liberty, while non-intentional interference conditions it. There are two main problems with this ideal according to Pettit. The first problem is that non-interference is what he called "constitutionally impoverished," since it sees all state-coercive action as bad, regardless of whether it is arbitrary or not. Secondly, non-interference is sociologically impoverished as well, since it suggests that only actual interference can undermine discursive control.[514]

Pettit subsequently argued that the political ideal of non-domination articulates the requirements of discursive control that we might reasonably expect the state to monitor and do something about.[515] Non-domination does not indict interference as such, but only so far as interference is *arbitrary*. Interference in this perception is arbitrary where it is not forced to track the avowable interests of the interferee.

Moreover, non-domination indicts not only the experience of arbitrary interference but also any exposure to a power of arbitrary interference, whether or not that power is actually being exercised.[516] By targeting and condemning only arbitrary interference, the ideal of non-domination attempts to establish a polity that can possess coercive powers but is constrained to such an extent that these powers tend not to be arbitrary.

The idea is that when the state is forced to track *only* the people's common avowable interests, this does not represent an assault on people's possession of discursive control.[517] The fact that sometimes non-arbitrary state coercion is required, can be explained by the assumption that although a people's common

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511 For the full argument, which falls outside the scope of this study, see Pettit, 2001, Chapter 6.

512 The general trust of the indigenous peoples movement is one for non-dominated equality. In this study, the goal is to explain FPIC as a means to achieve non-dominated decision-making for indigenous peoples. A key reference is also the "Cobo definition" of indigenous peoples, which mentions "non-dominant sectors of society" as an important element.

513 Pettit, 2001, p. 150.

514 Pettit, 2001, p. 150. Pettit explains that exposure to any power of non-arbitrary interference, regardless of when this power is actually being exercised, may infringe upon one's freedom.

515 Pettit, 2001, p. 138.

516 Pettit, 2001, p. 138-139.

517 Pettit, 2001, p.139.

avowable interests may support a given form of state action, their self-serving interests may not do so occasionally.[518]

Furthermore, the non-domination ideal is attractive since it expresses that discursive control can be jeopardized by exposure to a power of arbitrary interference, not just by the actual experience of such interference. Pettit denoted such an exposure as *"in potestate domini,"* i.e. without the actual presence of such interference.[519] In this light, state action may be required just by the bare fact of asymmetrical powers of interference, in other words, by a mere exposure to such arbitrary interference.[520] The political ideal of non-domination expresses that non-interfering masters can jeopardize the freedom of their subjects so far as they have and are seen to have an arbitrary power - when they are not forced to track the common avowable interests - of interference in the lives of those individuals.[521]

Another reason for adherence to the ideal of non-domination is that, like non-interference, it lends itself to a distinction between factors that compromise, and factors that condition freedom.[522] In this way, a distinction is made between primary "compromising" evils and secondary "lesser" evils that only "restrict" liberty to some extent. Pettit stated that impersonal and non-intentional obstacles can condition freedom as non-domination, and thus qualify as a secondary evil. Restrictions imposed on agents in the enactment and administration of non-arbitrary laws can condition freedom as well, and these restrictions also count as a secondary evil.[523] Therefore, there are definite grounds for reluctance about imposing legal restrictions even though they do not necessarily compromise freedom, [524] Since this concern for reducing the factors that condition freedom as non-domination are built in to the concept, the ideal has an environmental as well as an agency aspect.[525]

Pettit concluded that the ideal of non-domination describes a concern that can be put into the hands of the state and it described this concern in such a way that if the state does well in living up to it, then the people living under that polity stand a fair chance of enjoying a high level of discursive control.[526] Non-domination allows the state to act as a *non-mastering interferer* that does not compromise freedom. It does allow for the conditioning of freedom, so far as the arbitrariness of this conditioning can be reduced. Furthermore, non-domination recognizes that "masters" that do not actually interfere with others can jeopardize a subject's freedom. The experience of possible exposure to non-

[518] Pettit, 2001, p. 141
[519] Pettit, 2001, p. 140.
[520] Pettit, 2001, p. 150.
[521] Pettit, 2001, p. 150.
[522] Pettit, 2001, p. 142.
[523] Pettit, 2001, p. 142.
[524] Pettit, 2001, p. 142.
[525] Pettit, 2001, p.143.
[526] Pettit, 2001, p. 150.

arbitrary interference, a form of mis-recognition, may be in itself harmful to indigenous communities.[527]

In this way, freedom as non-domination is the most attractive ideal for the state to follow if it is to respect indigenous peoples' right to self-determination. "Freely determine" therefore implies that the state abides by the principle of non-domination in such a way that it only uses its power, and recognizes that it will only use this power, for non-arbitrary interference. When perceived in this light, it becomes easier to assert when indigenous peoples' right to self-determination is respected.

A Conception of Democracy that is Hospitable to Minority Rights

So far, we have proposed indigenous peoples' right to self-determination as a concept that is aimed at regulating the interaction between different actors and which entails requirements of autonomy and equal participation. As such, self-determination is about assessing the boundaries and modes of interaction. Free, prior and informed consent is devised to function as the procedural principle for guiding such interaction. Through Pettit's freedom theory as discursive control, it was argued that indigenous peoples, as far as they count as social integrates, can have the capacity for freedom as discursive control.[528]

Non-domination is the political ideal that is to be preferred in a society that furthers such discursive control and, particularly important for indigenous peoples, non-domination does not mean that the actual experience of arbitrary interference can compromise such freedom (mis-recognition). Indigenous peoples, as far as they count as social integrates, can count as free persons, and this freedom is compromised when this interpersonal capacity is influenced by hostile coercion.

One more question will be dealt with in this paragraph on Pettit and indigenous freedom. Since indigenous peoples are intra-state entities that are often in a non-dominant position, what kind of conception of democracy can accommodate the exercise of indigenous self-determination, as entailing special participation rights for minorities and indigenous peoples? In Tully's vocabulary; what is needed to realize such appropriate forms of self-rule for indigenous peoples?

As explored earlier in this study, special minority rights serve to protect certain minorities in the way that general rights may also do, but what makes them special is that they are group differentiated.[529] These rights are accorded on a basis of group membership. Such special rights can be individual as well as collective, but their common feature is that they are exclusive to the minorities they favor.

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[527] *See* Taylor C, 'The Politics of Recognition' in Amy Gutmann, *Multiculturalism, Examining the Politics of Recognition* (Princeton University Press, Princeton, 1995), p. 25 - 73.
[528] Obviously, this is nowadays a mainly uncontested idea within the international indigenous rights discourse.
[529] *Cf.* Kymlicka, 1995.

Kymlicka saw them as mechanisms that protect minorities against the possible injustices of state nation building.[530] In the previous paragraphs on Tully's ideas, it was argued that these are tools to determine forms of self-rule by means of a "multilogue." Pettit argued that in order to accommodate such minority rights, the concept of electoral democracy needs to be supplemented with what he calls a contestatory dimension.[531]

Electoral democracy generally approximates three principles; firstly, government is elected by the people, secondly, the people enjoy full and equal electoral standing (the no exclusion/equality principle), and thirdly, the people are collectively sovereign.[532]

Pettit noticed that there are problems for vulnerable minorities in the context of the second principle - that of electoral equality - but stated that there is a more fundamental problem with the sovereignty of the people principle. The equality problem can be solved by stating that although special rights' implementation may provide unequal treatment, it still treats people as equals.[533] The rights can still be regarded as general in character. Each has the right, should the conditions in question apply to them, to receive the treatment offered.[534]

The more serious problem is that minority rights appear to restrict the sovereignty of the people in a way that is inconsistent with that principle.[535] The contrast between these and other special rights, for handicapped people, amongst others, which are consistent with majority sovereignty, is that special minority rights are inherently counter-majoritarian in character. In other words, whatever the majority wants, there are still certain rights that are accorded to minorities.[536]

Pettit claimed that as long as we think of democracy in the image of the electoral conception alone, special minority rights cannot be defended as essential to democracy, since in this perception they are perceived as counter-majoritarian constraints that are imposed upon democracy from outside. To solve this, democracy is in need of a second dimension. Apart from a first, electoral dimension, a second, contestatory dimension is needed.[537]

He meant that the relevant interests of governed are not their special or sectional interests, but their common interests.[538] A certain good will represent a

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530 Instead of perceiving minority rights as a special status or privilege. Kymlicka W, *Politics in the Vernacular, Nationalism, Multiculturalism and Citizenship* (Oxford University Press, 2001), pp. 1-2.

531 *See*, Pettit, 2001, Chapter 7, *Also See* Pettit P, 'Minority Claims under Two Conceptions of Democracy', in: Duncan Ivison, *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, 2000, pp. 199-215. (Pettit, 2000).

532 Pettit, 2000, p. 201.

533 In this respect it follows the well-known reasoning from the PCIJ in the 'Minority Schools in Albania' case: Permanent Court of International Justice, *Minority Schools in Albania Case*, Ser. A/B No. 64, 1935.

534 Pettit, 2000, p. 202.

535 Pettit, 2000, p.202

536 Pettit, 2000, p. 203

537 Pettit, 2000, pp. 204-205.

538 Pettit, 2000, p. 205.

common interest to the extent that cooperatively avowable considerations support its collective provision.[539] Pettit described such cooperatively avowable consideration as those considerations that could not be dismissed as irrelevant if the members of the population were holding discursive discussions about in which field they should cooperate and collectively provide for.[540]

Pettit claimed that this has immediate consequences on how democracy should be organized; it demands that two kinds of institutions are needed. First, there is a need for institutions that reduce *false negatives,* by which the non-identification of certain common interests is meant.[541] Such reduction of false negatives serves to promote democratic effectiveness.[542] Secondly, institutions are required that guard against *false positives*; i.e. the misidentification of certain interests as common interests. This is needed in order for no group or individual to have a "lesser" place in that community.[543] Preventing false positives to enter the democratic arena serves to promote democratic equality.[544]

Democratic institutions are less likely to do well in avoiding false positives, whereas electoral institutions are vulnerable to both majoritarian and manipulative control, to the detriment of the voice of vulnerable groups, for example indigenous peoples. Therefore, there is a need for institutions that try to guard against interests masquerading as common interests and, more generally, against interest having an impact on how government is conducted. Pettit stated that such a guardian can be found in what he calls the *contestatory dimension* of democracy.[545]

Pettit described this contestatory dimension as a form of editorial control that complements the electoral, authorial mode of control over government decision making.[546] Such an editorial mode of democratic control should not just rely on the availability of *ex post* objections but should also allow for forms of *ex ante* control.[547] Such ex ante measures should serve first to provide the authors with guidelines on the editorial policy and make clear that breach of those would be objected to. This involves the imposition of general restrictions on how government is to act, for example by means of a bill of rights, bicameral structure etc., but they can also entail specific procedural guidelines.[548]

An important *ex ante* measure is to insist that at least in certain areas, government should put out its proposed initiatives for public consultation and seek to ascertain the opinions of those likely to be affected by a proposed decision.[549] In these areas FPIC is to provide such a contestatory measure for

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539 Pettit, 2000, p. 205
540 Pettit, 2000, p. 205
541 Pettit, 2000, p. 205.
542 Pettit, 2000, p. 206.
543 Pettit, 2000, p. 205.
544 Pettit, 2000, p. 206.
545 Pettit, 2000, p. 206.
546 Pettit, 2000, p. 207.
547 Pettit, 2000, p. 207.
548 FPIC processes are an example of such a specific ex ante editorial measure.
549 Pettit, 2000, p. 208.

indigenous peoples. Necessarily, *ex post* measures should also be present in the form of for example judicial review or other forms of revision mechanisms.

These provisions all represent ways in which it may be possible for different groups among the governed to be reassured that they are protected in some measure against unequal treatment.[550] Pettit noticed that there are not only institutions imaginable, but also in existence that give people a contestatory power that parallels their collective power to determine who shall be in government.[551]

In implementing this contestatory dimension, Pettit proposed an addition to the three electoral principles. He introduced a fourth principle that provides individuals and collectives with full and equal contestatory standing. Furthermore, he adapts the principle of collective sovereignty to include contestatory elements.[552]

Pettit's two dimensional model were aimed at implementing a form of participatory democracy that enriches one dimensional, electoral democracy. The model's purpose is implementing a continuous process of accountability and transparency of government action.[553]

Pettit argued that such *ex post* and *ex ante* contestatory constraints should not be seen as limitations on democracy, but rather as aspects of it since they provide for editorial control.[554] While there is an obvious contrast between electoral and contestatory action, they both represent moments in the assertion of the interests of the governed and forms of governmental accountability.

Group Differentiated Rights and Two-Dimensional Democracy

What makes the contestatory addition to electoral democracy more hospitable to minority claims? Pettit agreed that unless special minority rights are put in place, electoral-cum-contestatory democracy will not be able to function properly in many circumstances.[555]

There are a number of circumstances that call for special minority rights, circumstances that we recognize in the position and status of indigenous peoples. These are, (a) the presence of a robust minority; (b) the particular minority has a common set of interests; (c) those interests are at least partially distinctive; (d) these interests are vulnerable to collective decision-making; and (e) all these things are a matter of common awareness.[556]

Pettit stated that in situations of cultural diversity – to use Kymlicka's vocabulary; multi-nation states in which different national minorities reside – it

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550 Pettit, 2000, p. 209.
551 Pettit, 2000, p. 209.
552 Pettit, 2000, p. 210.
553 Pettit, 2000, p. 211. Again, this is very much in line with Tully's vision on fair intercultural dialogues in multi-nation states, examined in paragraph III.2.4.
554 Pettit, 2000, p. 211.
555 Pettit, 2000, p. 211.
556 Pettit, 2000, pp. 211-212.

may take much stronger institutions of contestation to assure that decisions that the minority culture does not like are really just the product of bad luck instead of the result of false positives.[557] The fact that a society is multicultural means that the democratic state is going to have to take special steps to try and establish the equal and full contestatory power of those in minority groups. Therefore, Pettit reasoned, the only recourse is the recognition of minority claims of various sorts.[558]

Pettit distinguished between three levels of severity that such special minority rights can entail. These forms or levels of severity are, to some extent, similarly reflected in the UNDRIP. The first and least severe measure would be a minimal right of specific consultation. Such minimal consultation rights should be put in place where a minority is generally respected in the larger society.[559] A second level is needed in situations where there is more divergence of interests; here specific exemptions or provisions in favor of the minority are required.[560] A third and most "severe" level of minority rights might be necessary in situations where neither rights of consultation nor rights of special treatment suffice. As we have explored, regarding indigenous communities, the cultural diversity may be such that the only recourse for the state is to give over its decision-making powers on a range of issues that affect the community to their own representatives and their own government. Pettit referred to Tully and agreed that such situations (situations in which indigenous peoples often find themselves) require stronger forms of self-rule.[561] There is a need for forms of self-determination that entail control and rights over lands and resources.

Pettit agreed that particularly within indigenous nations incorporated in the democratic state, where differences in relation to the significance accorded to land and traditions of land holding occur, the only recourse to implement electoral-cum-contestatory democracy would be granting the minority suitable powers of self-government.[562]

Although such a society involves different nations, the rationale for minority self-government continues to derive from the need to give people equal contestatory standing within one and the same democratic system.[563] This is in line with our perception on indigenous self-determination as non-dominated and intra-state participation.

Pettit did state that if the case for minority self-government is made to derive only from the distinctness of the nations as such, and not from the contestatory, participatory problems to which the distinctness gives rise, then it may be too strong to comfort.[564] This again confirms the current understanding

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[557] Pettit, 2000, p. 213.
[558] Pettit, 2000, pp. 212-213.
[559] Pettit, 2000, p. 213.
[560] Pettit, 2000, p. 213.
[561] Pettit, 2000, p. 214.
[562] Pettit, 2000, p. 214.
[563] Pettit, 2000, pp. 214-215.
[564] Pettit, 2000, p. 215.

on indigenous self-determination, since this would imply a choice between suffering the majority culture and becoming a separate state; this was in particular not the way perceived as feasible.

In summary, Pettit's claim can be described as follows: If we think that democracy requires a regime under which people have equal and full contestatory as well as electoral standing, then we should have no difficulty in seeing special group differentiated rights for indigenous peoples as a natural part of the democratic structure.[565] There should be no hesitation about asserting that multicultural democracy is bound to make room for establishing such rights, whether at a minimal or at an intensive level.[566] Special minority rights are therefore not undemocratic under an electoral-cum-contestatory democratic model, but, on the contrary, enhance the democratic fabric of the state.[567]

In conclusion, indigenous self-determination and corollary forms of self-rule do not compromise democratic demands in a society that fosters both an electoral and contestatory conception of democracy. A participatory democratic regime like this, in which the state upholds a principle of non-domination, can preserve indigenous peoples' political freedom.

Conclusions: Qualifying "Free"

This paragraph started with two related questions that are an important part of this study's objective, which is to explore what FPIC for indigenous peoples could amount to: How can we explain the requirement of "free" in FPIC, and which political principle or ideal is needed to secure that indigenous communities are able to "freely determine" their political status and freely pursue their own way of economic, social and cultural development? The answer to the first question will make it easier to determine, in a more practical manner, whether the requirement of "free" has been upheld.

That consent has to be provided in a way that can be depicted as free, so that it is possible to speak of "fitness to be held responsible," means that indigenous peoples should be involved in decision-making processes in such a manner that they have discursive control in those processes.

Pettit's theory of freedom allows us to see indigenous peoples, to the extent that they count as purposive social integrates, as being capable of sustaining discursive control. This makes it possible to qualify "free." It is in the first place a form of personal freedom, since FPIC processes take place between indigenous peoples and some other party.

As long as the interaction in FPIC processes is discourse-friendly, indigenous peoples' freedom is preserved. But discursive control prohibits all action that is "discourse-unfriendly;" action that may obstruct, endanger, or limit discursive

565 Pettit, 2000, p. 215.
566 Pettit, 2000, p. 215.
567 Pettit, 2000, p. 215.

influence between parties. As such, it rules out all interventions by others that restrict, undermine, or jeopardize discourse.

Pettit's account does not only expose that it is discursive control that is meant when requiring that consent is given "freely" but also explains what kind of actions in FPIC processes will preserve the freedom in the agent, and what kind of actions will not.

As long as the interaction is discourse friendly, the element "free" will be respected. Coercive actions like bids, offers, or pleas – which will often be present in situations in which FPIC plays a role - will not violate the "free" requirement. However, when these actions turn into forms of hostile coercion, or hostile threat, they will violate the freedom criterion.

This insight is crucial, since these sorts of coercive actions will often be present in FPIC processes. When a logging concession is discussed, or a large extractive industry project is planned, the other party will inevitably use some form of coercion to gain indigenous peoples' consent. It is in this area that it is now possible to determine if such actions compromise the discursive control and consequently the freedom of indigenous peoples. It also makes it possible to see that freedom can come in "degrees," by indicating a range of measures or actions that may restrict freedom to a certain extent.

Indigenous self-determination is aimed at protecting distinct cultural minorities by requiring on the one hand a form of autonomy and self-government and on the other hand by facilitating more equal participation in the larger democratic order. In other words, self-determination for indigenous peoples is aimed at protecting indigenous communities from the adverse effects of state nation building and allows for indigenous nation building within a participatory framework in one and the same democratic system.

The political ideal of non-domination is the best principle for guiding state action in multi-nation states, whereas it forces the state to track the people's common avowable interests in such a way that relations between individuals and groups in society can be perceived as non-dominated; either through actual or virtual interference.

An electoral perception on democracy is not particularly hospitable to minority rights since they are inherently countermajoritan in nature. A second, contestatory dimension, allows us to think of democracy as compatible with indigenous self-rule structures, entailing self-determination and control over lands and resources in order to protect their cultural identity and survival. Indigenous self-determination and FPIC are about the distribution of non-majoritarian forms of power sharing and creating appropriate forms of self-rule. FPIC provides indigenous peoples with a form of "editorial control" and as such enforces democratic decision-making instead of compromising it.

Explaining freedom as being fit to be held responsible together with the concept of discursive control make it possible to assert in a very practical manner, what is meant by the requirement of "free" in FPIC and when such freedom is respected or breached. If discourse friendly interaction guides the process, the freedom of the parties – the personal freedom that is involved in FPIC processes - will be guaranteed.

III.3.2 Prior: Ex Ante Contestation and Ex Post Revision

An act of "consenting" does not only function as a procedural justification for what otherwise would count as an infringement upon rights, but it often also serves as the basis for a new relation between the actors involved; e.g. when a transnational corporation carries out a long-term mining or logging project on indigenous lands.[568] An important question therefore is: should FPIC only function until the moment of the decision, *ex ante*, or should it continue to guide certain processes *ex post*?

Of course, it is essential that indigenous peoples have enough time to discuss any proposed activity that affects them amongst themselves. For successful FPIC processes, there has to be sufficient time for internal debate and decision-making. How much time is needed depends on many variables and evidently varies from case to case. Recall the 2005 UNPFII workshop concluding observations:

> **Prior** should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.[569]

Nevertheless, as discussed throughout this study, FPIC is not just a single moment of decision-making, but an iterative process that is meant to help create a climate of trust and respect between indigenous peoples and states. Like a participatory view on self-determination, FPIC is a principle with a continuous or ongoing relevance. James Tully already exposed that continuity is an essential principle for sustainable relations between different nations in one state, to make his multilogue possible. Philip Pettit explained that in a democracy indigenous or minority groups require both *ex ante* and *ex post* powers to guard against arbitrary decision-making. In this way, FPIC provides indigenous peoples with a form of "editorial control" over certain political decisions.

Moreover, full priority may often be difficult to uphold as a criterion, since initial stages of projects may very well be under way and may already negatively affect indigenous communities. One could think of examples such test-drilling, preliminary seismic scoping, or the "discovery" of traditional plants or medicines. In practice, these cases will often arise and the FPIC process will commence while some intrusive activity is already taking place.

In short, prior is an important requirements and for any genuine FPIC process, there should be ample time allocated for internal debate and decision-making according to a community's own cultural customs. Nevertheless, FPIC is not only relevant prior to any agreement between indigenous peoples and others, but it is also concerned with sustaining respectful relations over time.

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[568] *Cf.* Brownsword R and Beyleveld D, *Consent in the Law* (Oxford, Hart, 2007).
[569] E/C.19/2005/3, paragraph 46.

FPIC may include revision of existing arrangement in light of new information or changed circumstances. A proper balance has to be struck between effective decision-making and powers to revise and adapt FPIC agreements. The most important requirement that "prior" denotes is that indigenous peoples are given sufficient time - taking into account their cultural decision-making structures - for deliberation, discussion, and the formation of their standpoints.

One of the most essential requirements for successful FPIC processes is that parties are properly informed about the relevant implications a decision may entail. This is the topic of the next paragraph, where a perspective on FPIC from the field of bioethics is presented.

III.3.3 Information and Communication

Introduction

After having explored that "effective participation" for indigenous peoples should be achieved through an intercultural dialogue and having argued that "free" in FPIC processes requires a sufficient amount of discursive control, it is time for the next step in getting to a better understanding of FPIC and its different elements. This paragraph will look into what is meant by *informed* consent. The "informed requirement" together with the requirement that consent is provided "freely" form the two key pillars of successful FPIC processes; they safeguard the validity of consent. Unfortunately, it is also often regarding these two requirements that participatory or consultation processes fail. A more developed understanding of these criteria may therefore contribute to better FPIC processes.

In this paragraph, the contemporary debate on informed consent within the field of bioethics will be analyzed and compared with FPIC requirements in the indigenous context. The goal of this paragraph is to expose the debate and reveal the relevance to the debate on free, prior and informed consent for indigenous peoples. Apart from explaining that current accounts on the requirement of "informed" in the indigenous rights context are too shallow, the bioethics-debate will also disentangle the notion of "informed consent" as a whole.

Since informed consent requirements have been present within the bioethical field for a long time – in fact, they were first developed here - and have been subject to a lot of reflection, it is useful to conduct some "internal comparative legal research" to gain insights that are particularly relevant to this study. It will be argued that, just like in the field of bioethics, ever more stringent or uniform standards of consent may not be the proper way to proceed. Furthermore, Manson and O'Neill's 2007 study illustrates that only focusing on "disclosure of information" hides a number of relevant considerations that should play a role when we speak of "informing."[570]

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[570] Manson N and O'Neill O, *Rethinking informed consent in bioethics* (Cambridge University Press, 2007) (Manson and O'Neill, 2007). Neil Manson is Lecturer in Philosophy at the

Moreover, the bioethics debate is highly instructive in coming to terms with what exactly the functions are of a legal concept of informed consent.

In brief, in this paragraph it is examined what "informing" in FPIC entails by exploring another field of law in which informed consent requirements have played a central role for a long time; the field of bioethics.[571]

Nevertheless, this paragraph is not only about informing but about the legal concept of informed consent as a whole as well. By exploring the notion of informed consent in research on bioethics, it is possible to provide a detailed legal analysis of the concept of informed consent. Some new perspectives on the legal concept of consent will provide insights for its application in the indigenous rights context.

The following paragraphs will explore Manson and O'Neill's 2007 study on informed consent in bioethics at length.[572] Their main argument was that the focus in these procedures should not only be on disclosure requirements, but that informed consent processes concern *communicative transactions* that are as much about the way the communicative process is structured, as they are about disclosing information. Manson and O'Neill provided a clear and well-argued theory on how *communication* should take place within the context of informed consent requirements.

A number of questions will be discussed. Certainly, it may be instructive to have a look at where informed consent requirement come from: Where were they first developed? And how? Better insight into the following questions may be gained by looking at the field of bioethics: What are the justifications for FPIC processes and what is its role or function as a legal concept? Which standards are important for successful communicative transactions? How should "informing" and the requirements this includes be perceived in relation to indigenous peoples?

This paragraph will indicate that the "informed" criterion is (together with the previously discussed element "free") the most essential requirement in an FPIC process. Moreover, it will be argued that "informing" entails much more than just "informational disclosure."

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571 A considerable body of literature on informed consent and autonomy in bioethics exists. However, these paragraphs will primarily examine Manson and O'Neill's study, since this recent work conceptualizes informed consent as a communicative process. This way it aligns with one of the main arguments in this thesis; that FPIC processes are essentially about effective participation and communication. Other well known works on informed consent in bioethics include the 'classic' work: Faden R, Beauchamp T and King N, *A history and theory of informed consent* (Oxford University Press, USA, 1986) and the standard textbook: Beauchamp T and Childress J, *Principles of biomedical ethics* (Oxford University Press, USA, 2009).

572 Manson and O'Neill, 2007.

A richer account reveals that communication is context based and dependent upon implicit knowledge of the shared interests, competences, and commitments of the parties involved.[573] Furthermore, provision of fully specific information seems impossible; relevant communication always involves the withholding of some details that could have been disclosed.[574] Finally, and in line with earlier paragraphs, it will be argued that ever more strict and uniform FPIC requirements are undesirable and infeasible.

The "Informed" Requirement for Indigenous FPIC

Informing indigenous peoples of the impact and consequences of a proposed project or decision is essential to FPIC but in practice this is often were things go wrong. Indigenous peoples may - and often are - misinformed in many ways. Moreover, effective communication between indigenous groups and other actors is often complicated by cultural or language differences.

With respect to the international protection of indigenous peoples, the 2005 "elements of common understanding," mentioned earlier, are the most referred to clarifications of the requirements of FPIC.[575] In relation to the requirement of informed, recall that:

> **Informed** should imply that information is provided that covers (at least) the following aspects:
>
> a. The nature, size, pace, reversibility and scope of any proposed project or activity;
>
> b. The reason(s) for or purpose(s) of the project and/or activity;
>
> c. The duration of the above;
>
> d. The locality of areas that will be affected;
>
> e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;

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573 This richer account is what Manson and O'Neill call the 'agent based model' of informed consent.

574 Manson and O'Neill, 2007, p. 67.

575 *Cf.* Anderson P, 'Free, Prior, and Informed Consent: Principles and Approaches for Policy and Project Development', RECOFTC – The Center for People and Forests, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Sector Network Natural Resources and Rural Development – Asia, Bangkok, February 2011.

f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);

g. Procedures that the project may entail.[576]

The accompanying legal commentary by Iulia Motoc, explained in its conclusions regarding development projects that FPIC is important since this way: "Indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being."[577] Furthermore, the Inter-American Commission on Human Rights explained in the "Dann Case" that informed requires that "all of the members of the community are fully and accurately informed of the nature and consequences of the process." [578]

There have been more elaborations on what informing in FPIC denotes, but these have been devised mainly within specific areas, and deal mostly with environmental protection schemes like REDD+ or criteria for sustainable forest-management (SFM).[579]

This is not strange, because it is obviously very difficult to devise a "blanket approach" for informational requirements, since these vary per case and per context. Moreover, and very importantly, the requirements of FPIC should always be tailored to the right or value that is at stake in informed consent processes.

While a number of these more specific requirements will be discussed in part V, for now, it is important to note that "informed" so far focuses almost exclusively on informational disclosure; on which type of information is to be provided. But of course there is far more to "informing" than only determining what kind of information is to be provided.[580] In the following paragraphs some standards that are important for the "communication part" of informing will be indicated.

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576 E/C.19/2005/3, paragraph 46.

577 E/CN.4/Sub.2/AC.4/2005/WP.1, Motoc, Iulia, *Standard Setting, Legal Commentary on the Concept of Free, Prior and Informed Consent*, 14 July 2005, paragraph 57.

578 IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002, paragraph 140. Emphasis added. This and other related cases will be explored in Part V of this study.

579 But also in other fields, like in the context of the World Commission on Dams or the Convention on Biological Diversity. These specific fields will be examined in Part V.

580 Recent studies in the context of REDD+ acknowledge that the process of communication is also an important element of the 'informed' requirement. See e.g. Tanzania Forest Conservation Group, *Making REDD work for communities and forest conservation in Tanzania*, TFCG Technical Report, 27, 2011.

III.3.3.1 Informed Consent in Bioethics: Development, Scope and Justifications

Informed consent has been the subject of extensive academic debate within the field of medical ethics, where the concept is seen as one of the cornerstones of that discipline. The notion of a specific prior informed consent procedure emerged in the wake of the Second World War, especially in the field of Bioethics in light of the horrible Nazi-experiments that took place during WWII. The academic debate within this field on informed consent is quite substantial and has, over the last four decades evolved legal and ethical thinking on consent in many ways.

As was illustrated before, for indigenous peoples a legal notion of informed consent, as a specific right, is a rather new phenomenon (although the political idea of consent is not new). In this paragraph, the contemporary theoretical debate concerning the notion of informed consent in bioethics will be exposed, in order to illustrate some of its benefits and drawbacks. Conscious of the differences in context an exposition of certain issues from this debate will provide clarifying information relevant to the idea of free, prior and informed consent, within the indigenous rights framework.

In particular, it will be argued that the focus should not only be on which type of information is provided, but also on how this information is offered. An important aspect of FPIC is that it concerns communicative transactions.

The role or function of FPIC is also explored. It will be shown that consent is a "secondary" right, and therefore cannot serve as the primary justification of particular action. Consenting concerns a *waiver* of other, more fundamental entitlements. Since consenting may - and very often will - have profound effects for indigenous communities, it should be accompanied with certain standards - free, prior, informed - that secure its validity.

Development of Informed Consent in Bioethics

Since the Nuremberg Code of 1947, informed consent is widely seen as fundamental to medical and research ethics.[581] Consent requirements were extended from research to clinical ethics, and later on to procedures regulating the acquisition, possession, and use of personal information. More recently this requirement has become popular in a number of other fields, amongst others the one we are concerned with: the field of indigenous rights. Within the bioethical field, consent requirements also evolved as more specific and explicit standards were endorsed. Under the banner of respect for autonomy, ever more elaborate consent procedures were created. But recently, this movement towards ever more strict, uniform and demanding consent requirements has been questioned.[582] Manson and O'Neill, in their study "Rethinking Informed

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[581] Edwards D J, *Eroding Ethical Prescribing – How Pharmaceutical Marketing Undermines Informed Consent and Causes Harm* (Thesis, Centre for Human Bioethics, Monash University, Submitted on 10 August 2009).
[582] Manson and O'Neill, 2007, p. ix.

Consent in Bioethics," stressed that an overemphasis on personal choice and autonomy neglects and obscures a number of other relevant considerations that have to be taken into account in an FPIC process. Those other relevant considerations will be discussed in the following paragraphs.

Informed consent, according to Manson and O'Neill, should be sought and obtained by distinctive sorts of *communicative transactions*. We have already mentioned that a focus on process and dialogue is vital for a successful application of FPIC. Manson and O'Neill concurred that it is unlikely that informed consent is understood well enough unless the sorts of communicative transactions it requires and the particular standards they must meet are included in the considerations.[583] This is particularly so in the context of indigenous peoples, since factors like language, culture, and isolation certainly complicate communication.

Contemporary accounts of informed consent only represent these sorts of transactions passively, as "information transfer."[584] Information in these views is seen as located or held in one place, or flowing from one place to another. Information flows are seen as the transfer or transmission of information from one source or container to another, through a conduit, or channel. This is what Manson and O'Neill described as the "container" or "conduit" metaphors.

These metaphors provide a common vocabulary for discussion of the transfer of information, but, according to Manson and O'Neill, they obscure the fact that informing and communicating should be seen in light of the normative framework that governs successful communicative transactions between people.[585]

Manson and O'Neill explored the standards that informed consent processes should meet if they are to be used to successfully *waive* obligations, rights, and prohibitions.

Development of Informed Consent in the Field of Bioethics

As discussed previously in the paragraphs on self-determination, the political idea that freely given consent legitimates governmental (coercive) action that would otherwise be unacceptable developed in the enlightenment debates, mainly within the framework of social contract theory. Over the past thirty years or so, these traditional debates have been revitalized and reshaped.[586] This move has been paralleled in biomedical ethics and currently informed consent is the most discussed theme and most central principle in medical ethics and research

583 Manson and O'Neill, 2007, p.viii.

584 As explained above, elaborations on the 'informed' requirement in the context of indigenous peoples also focus primarily on informational disclosure.

585 Manson and O'Neill, 2007, p. ix

586 See e.g.: Rawls J, *A theory of justice* (Belknap Press, 1999)

ethics.[587] Over the years, the conceptions on informed consent have changed in relation to its scope, standards, justification and regulatory use.[588]

The *Nuremberg Code* of 1947 is generally seen as the first authoritative statement of the requirement of informed consent in biomedical ethics. It came as a response to the atrocities committed by the Nazi's before and during World War II.[589] Initially drafted by two doctors who worked on the Nuremberg trials, it outlined the most important points that should guide all research on human beings. Although the legal status of the Code remained unclear, it became a landmark document. Most importantly, the Code stated that:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment. [590]

The reasons given for the statement that "the voluntary consent of the human subject is absolutely essential" echo those traditionally offered by political theorists about the nature of the social contract; i.e. grounding obligations of citizens in a requirement of consent.[591]

The legal capacity to give consent is seen as essential, and involves the free exercise of choice. Furthermore, it is clear that forms of force, fraud, duress, and coercion are prohibited, similar to the requirements that "freedom as discursive

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587 Manson and O'Neill, 2007, Also See: Beauchamp T and Childress J, *Principles of biomedical ethics* (Oxford University Press, USA, 2009).

588 This move towards an increasingly wider scope, higher standards, better justifications and regulatory reinforcements has created a number of problems. This is one of the main arguments Manson and O'Neill put forward in their research.

589 Manson and O'Neill, 2007, p. 2.

590 The Nuremberg Code is excerpted from *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10.* Nuremberg, October 1946 - April 1949. Washington D.C.: U.S. G.P.O, 1949-1953. The phrase that informed consent should imply knowledge about the nature, duration and purpose of the experiments clearly echoes in the earlier discussed elements of common understanding from the 2005 UNPFII workshop on FPIC.

591 Manson and O'Neill, 2007, p. 3.

control" imply, as was discussed earlier. Requirements of informing and autonomy are only implicitly present in the Nuremberg definition.

Since the 1960s, wider application of consent requirements has been promoted. Not only research ethics but also clinical ethics are now generally seen to be governed by a principle of informed consent. Although this expansion was clearly problematic from the beginning – refusing all medical treatment without informed consent is clearly unpractical – it has acquired central importance in all bioethical areas.[592] More importantly for our purposes, contemporary discussions about informed consent have sought to raise and expand standards.

The Nuremberg code was open to a number of objections. It requires a "legal capacity to give consent" and "sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision." This seems to imply that capacity by itself is sufficient, so that implicit or tacit consent is a genuine possibility. Moreover, it does not seem to imply that the subject *actually* makes an enlightened decision. The development of the discussion was led again by the debate in the field of research ethics, and contemporary discussions usually do not refer to the Nuremberg Code, but to a later document, and successive versions thereof: *the Helsinki Declaration*.[593]

The most recent version of this important statement was approved in 2004 and frames strong requirements for highly *explicit* and *specific* consent. The relevant passages read:

> The subjects must be volunteers and informed participants in the research project. In any research on human beings, each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail. The subject should be informed of the right to abstain from participation in the study or to withdraw consent to participate at any time without reprisal. After ensuring that the subject has understood the information, the physician should then obtain the subject's freely-given informed consent, preferably in writing. If the consent cannot be obtained in writing, the non-written consent must be formally documented and witnessed.[594]

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[592] Manson and O'Neill, 2007, p. 5. Patients might be unconscious, too ill, too young etc. to be able to give their informed consent.

[593] Manson and O'Neill, 2007, p. 8.

[594] World Medical Association Declaration of Helsinki (Exerpt), *Ethical Principles for Medical Research Involving Human Subjects*, Adopted by the 18th WMA General Assembly, Helsinki, Finland, June 1964, and amended by the 29th WMA General Assembly, Tokyo, Japan, October 1975; 35th WMA General Assembly, Venice, Italy, October 1983 41st WMA General Assembly, Hong Kong, September 1989; 48th WMA General Assembly,

Manson and O'Neill argued that the Helsinki requirements go further than the Nuremberg Code in that they demand that the subjects grasp – albeit in a general way – what is proposed and which risks are involved. Furthermore, it puts a duty of informing on the researcher. However, these standards may be too much. They seem to require ever more *explicit* and *specific* consent. This entails the risk that the Helsinki requirements may be going too far, that they are too explicit in their application, which might render their application impractical.[595] As was argued earlier, this is also a danger in relation to FPIC requirements for indigenous peoples; an overly uniform standard may cause it to become unrealistic and insensitive to context.

Manson and O'Neill explained that fully explicit and fully specific consent is not attainable, and that standards should not require this. *Explicit* consenting concerns a *two way process*; it concerns explicit statements from both parties. On the other hand consent can also be *implied*, when it is derived from the subject's action.[596] Fully explicit consent is simply not always achievable.[597]

The distinction between *specific* and *generic* bears not on the act of consenting, but on the propositions over which consent is given.[598] Ever more specific or exacting consent requirements are problematic, since they will be "unavoidably indeterminate," [599]

Manson and O'Neill showed that in effect demands for explicit and specific consent insist on formalistic, uniform and, strictly speaking, impossible procedures and standards. Rather, they stated, such demands should focus on feasible, proportionate, and normatively justified requirements.[600]

Fully specific consent cannot be ethically necessary, because it cannot be properly defined; how specific it ought to be is a question that cannot be answered, as this varies from context to context.[601] Manson and O'Neill thus explained that neither full explicitness nor complete specificity is possible in informed consent processes.[602]

In general they argued that consent is a *propositional attitude*, which makes it opaque; "there is no guarantee that when X and Y consent to Z, they both have the same views of the implications of Z."[603] Therefore, conclusions will vary

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Somerset West, Republic of South Africa, October 1996; and the 52nd WMA General Assembly, Edinburgh, Scotland, October 2000; Note of Clarification on Paragraph 29 added by the WMA General Assembly, Washington 2002 Note of Clarification on Paragraph 30 added by the WMA General Assembly, Tokyo 2004.

595 Manson and O'Neill, 2007, p. 9.

596 Manson and O'Neill, 2007, p. 10.

597 Manson and O'Neill, 2007, p. 12. Think about the situation of indigenous peoples living in voluntary isolation, which will be examined later on in this study.

598 Manson and O'Neill, 2007, p. 11.

599 Manson and O'Neill, 2007, p. 11.

600 Manson and O'Neill, 2007, p. 11.

601 Manson and O'Neill, 2007, p. 15.

602 Manson and O'Neill, 2007, p. 15. Still, as Manson and O'Neill argue, these excessive demands are repeated and leading in standard literature on informed consent.

603 Manson and O'Neill, 2007, pp. 12-13.

with the *inferences* the subject is able to draw from the terms used, and may differ even where the terms used refer to the same things.[604]

Their main point was that agents have varying beliefs, inferential commitments and vocabulary, and that therefore: "the best that we can hope for is a *mutually agreed level of specificity* in the disclosure for a particular transaction. And once this point is conceded, it becomes clear that explicitness and specificity cannot be general requirements on all consent."[605] There can be no single standard for the content and way in which information is transferred and disclosed.

These are important insights, and they explain why the focus in FPIC processes should be as much on the way in which communication is taking place between indigenous peoples and other actors, as it should be on informational disclosure. The following paragraphs will explore this perception in more depth.

Consent and Autonomy

Respect for *autonomy* is widely seen as the value underlying the consent is requirement, but it is not the only, and according to Manson and O'Neill, maybe not even the primary justification for informed consent.[606] The discussion will be briefly explained here, because self-determination and inherently forms of autonomy are also at the heart of the justifications for FPIC within the field of indigenous peoples protection. But FPIC processes for indigenous peoples are not just about "autonomous decision-making" or self-determined decision making, they may also entail a wider range of different interests and values that matter, since FPIC is secondary to other more important norms. In these processes, considerations regarding the environment or public health may also play a crucial role. In the debate on FPIC in bioethics, different views on the importance of "autonomy" exist.

Respect for the autonomous choice of persons is subject to a variety of interpretations regarding its scope, nature or strength.[607] In their 2009 study "Principles of Biomedical Ethics," Beauchamps and Childress aimed to show that respect for autonomy is not excessively individualistic, not excessively focused on reason, and not unduly legalistic.[608] They expressly stated that they do not hold that the principle of autonomy has moral priority over and overrides

604 Manson and O'Neill, 2007, p. 13.
605 Manson and O'Neill, 2007, p. 16. Italics added.
606 Manson and O'Neill, 2007, p. 17.
607 Beauchamp T and Childress J, *Principles of biomedical ethics* (Oxford University Press, USA, 2009) (Beauchamp and Childress, 2009), p. 99.
608 Beauchamp and Childress, 2009, p. 99.

all other moral principles, but they did conclude that it is certainly a vital value for justifying informed consent requirements.[609]

Autonomy, derived from the Greek *autos* (self) and *nomos* (rule, governance or law), originally meant the self-governance of independent city states. Its meaning has been extended to individuals but the precise meaning of the term is disputed. Personal autonomy encompasses – at least – self-rule that is free from both controlling interference by others and from certain limitations such as an inadequate understanding that prevents meaningful choice.[610]

Theories of autonomy view two elements as essential: first, *liberty* or freedom – independence from controlling influences – and second, *agency*, which can be described as the capacity for intentional action.[611] Disagreement exists regarding the meaning of these elements and whether additional requirements are needed.

The reasons why "respect for the autonomous agent" is so important are to be found foremost in the theories of Immanuel Kant and John Stuart Mill. Kant argued that respect for autonomy flows from the recognition that all persons have unconditional worth, and that each person has the capacity to determine his or her moral destiny. Derived from Kant's famous categorical imperative, violation of an agent's autonomy is to treat persons merely as means instead of as ends themselves.[612]

Mill was primarily concerned with the "individuality" of autonomous agents. In his version of liberty, persons should be allowed to develop to their own convictions, as long as these do not interfere with similar expressions of freedom by others, or unjustifiably harm them.[613] However, Mill also argued that in some cases, it is mandatory to persuade others when they have false or ill-considered views.[614] Mill thus argued both for non-interference and actively strengthening autonomous expressions, while Kant's conception of autonomy and freedom

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609 This is one of the main accusations made by Onora O'Neill in her work on informed consent. Since this part of the debate is not essential to this study, it is only mentioned here. *Cf.* O'Neill O, *Autonomy and Trust in Bioethics* (Cambridge University Press, 2001).

610 Beauchamp and Childress, 2009, p. 99. In the paragraphs on 'free' it was argued that non-domination is the key-principle for the state to uphold if it is to guarantee indigenous peoples' freedom.

611 Beauchamp and Childress, 2009, pp. 100-101. Beauchamps and Childress' analysis of autonomy does not focus on an ideal situation, but on non-ideal conditions that fit with the moral requirements of 'respect for autonomy'. They depict autonomous action in terms of normal choosers who act intentionally, with understanding and without controlling influences that determine their action. While intentional action is not a matter of degree, the other two elements are, and for Beauchamps and Childress it is enough that a 'substantial degree' of understanding and freedom from constraint is present. To restrict adequate decision making to compliance with an ideal of 'full autonomy,' strips the act of any meaningful place in practice, where people's actions are never fully autonomous.

612 Beauchamp and Childress, 2009, p. 103.(Drawing on Kant, Foundations of the Metaphysics of Morals, 1758).

613 Beauchamp and Childress, 2009, p. 103. (Drawing on Mill, On liberty, 1859)

614 Beauchamp and Childress, 2009, p. 103. (Drawing on Mill, On liberty, 1859)

entails a moral imperative of respectful treatment of persons as ends in themselves.[615]

The principle of "respect for autonomy" can be stated as both a negative and a positive obligation. Formulated negatively, it means that autonomous actions should not be subjected to controlling constraints by others. As a positive obligation, the principle requires both respectful treatment in disclosing information and actions that foster autonomous decision-making. In other words, material cooperation is needed for a lot of options to become available.[616] These positive and negative sides of autonomy are capable of supporting a range of more specific moral rules, like the principle of informed consent before intrusions are made upon rights or other standards.[617]

Rethinking Informing: An Agent Based Model

Manson and O'Neill's main critique on informed consent requirements was that the focus of these requirements is too much on informational disclosure, and not enough on the communicative processes that they should entail. Therefore, Manson and O'Neill distinguished between a "standard" or "disclosure" view on informed consent and another, richer model; the "agent based" view.

In the standard "disclosure" view, informed consent is required in order to respect autonomy, and the informational obligations are seen as justified because they enhance individual decision making.[618]

Acts of informing and communicating relevant in FPIC processes usually only succeed within a rich practical and normative framework in which speaker and audience (a) have certain practical and cognitive commitments; (b) know something of each other's commitments; (c) adhere to, and act in accordance with such norms; and (d) assume that the other party is acting in accordance with such norms.[619]

Information should be identified as *action* rather than as only as *content*. A narrow approach to informational obligations might distort the reality of informed consent transactions by downplaying or hiding their rich, multifaceted character, which involves much more than the "transfer" of information.[620]

Manson and O'Neill persuasively argued that the conduit/container model leads to two levels of distortion: firstly, an overemphasis on disclosure of information and decision-making, and secondly, a perception on information "content" alone. They warn that information cannot be seen as detachable from the norms that govern action. The next paragraph considers aspects of such

615 Beauchamp and Childress, 2009, p. 104.
616 Beauchamp and Childress, 2009, p. 104.
617 Beauchamp and Childress, 2009, p. 105.
618 Manson and O'Neill, 2007, p. 27.
619 Manson and O'Neill, 2007, p. 38 ff.
620 Manson and O'Neill, 2007, p. 48.

action that are often hidden or ignored when we focus too narrowly on the transfer of content.[621]

As was illustrated in the introduction, informational requirements, as they have been developed in relation to FPIC for indigenous peoples, are focused mainly on the type of information that is to be disclosed, rather than on the elements necessary for successful communicative action.

III.3.3.2 Informing as Communicative Action

So far, it was argued that an overemphasis on informational disclosure hides a number of important aspects of communication. Manson and O'Neill explained that what is essential for "informing" is focusing on intentional communicative acts and the normative questions that arise in this context.[622] They subsequently developed an "agent based" model of communication. The argument is that "informing" in informed consent procedures is a specific type of communicative action. before exploring informed consent itself, it will be examined what is meant by communicative action, and what standards should be held in mind for such action to be successful.

Intentional action is a "species of action," one that can be done only by *agents* with certain basis capacities.[623] Some of these capacities and properties collective agents should have were explored in the paragraphs on freedom, when Philip Pettit's idea of social integrates was discussed. For present purposes, it is enough to mention that at a bare minimum, agency involves practical and cognitive *commitments*.[624]

Agents need to grasp inferential relations between their commitments; the action must be "worth doing" in light of these commitments.[625] Furthermore, such actions are guided by all sorts of *inferences* agents make during communicative processes. Agents can – and most often do - make a vast number of reasonable inferences from all sorts of propositions that may be put forward in communicative processes, because normally they have a vast supply of

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621 Manson and O'Neill, 2007, pp. 48-49.
622 Manson and O'Neill, 2007, p. 51.
623 Manson and O'Neill, 2007, p. 51.
624 Manson and O'Neill, 2007, pp. 51-52. The authors explain that agents must have practical commitments that stem from their desires, needs, whims, preferences, and so on. Agents also have cognitive commitments: they take certain things (but not others) to be the case; some things to be likely, others to be impossible, and so on. Practical and cognitive commitments have different 'directions of fit' to the world. Cognitive commitments aim to fit the way the world is: they succeed if they match the way the world is. Practical commitments, in contrast aim to make the world, (in small part) fit our commitments. The aim to bring about certain situations. Further elaboration on the difference between these commitments falls outside the scope of this study.
625 Manson and O'Neill, 2007, p. 53.

background knowledge. These inferences are indispensable both for communicating successfully and for acquiring new knowledge.[626]

Manson and O'Neill explained that these key features of agency draw attention to the fact that it involves commitments with different "directions of fit," the ability to grasp rational relations between propositions and the ability to put one's commitments to act into action. Actions are a manifestation of the agent's point of view, but they are often "hidden." The conduit and container models that are often invoked when talking about communication downplay or "hide" the complex set of rationally evaluable practical and cognitive commitments, and the inferential relations between them.[627]

Communication essentially involves the commitments of agents in two broad ways: firstly, communication, as a "species of action," presupposes the practical and cognitive commitments both of those who seek to communicate and of those with whom they seek to communicate. Secondly, these types of actions have to take account of the commitments of others, and may aim to alter those.[628]

Through these insights it is possible to discern some essential features of successful intentional communication. Firstly, speaker and audience must share a language, secondly, speaker and audience must share a great deal of background knowledge about the world and about the social conventions that govern their behavior. Thirdly, speaker and audience must be able to draw upon that knowledge in making the right kinds of inferences: both must exercise inferential competence. Fourthly, speaker and audience must have some knowledge of each other's commitments and competences.[629]

This said, Manson and O'Neill came to a working definition of communicative action: speech acts take place against a background of a shared acceptance of complex sets of cognitive and practical commitments, entitlements, expectations, and social roles, and shared understanding of ways in which others' commitments can be modified.[630] Communicative actions play a role in allowing agents to do things that affect their own and others' commitments on the basis of existing commitments on the part of audiences and speakers alike.[631]

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626 Manson and O'Neill, 2007, p. 53. That is, without having to do anything new by way of 'discovery'.
627 Manson and O'Neill, 2007, p. 54.
628 Manson and O'Neill, 2007, p. 55.
629 Manson and O'Neill, 2007, p 56. These standards already provide a welcome and needed addition to what "informing" for indigenous peoples entails.
630 Manson and O'Neill, 2007, p. 5
631 Manson and O'Neill, 2007, p. 57.

Communicative Norms

Manson and O'Neill contended that because communication is so diverse, there is a variety of different ways in which speech acts can go wrong. Successful communicative actions are evaluable against multiple kinds of norms.[632]

Successful agency, and with it successful communication, requires a certain kind of responsibility, described by Manson and O'Neill as *"epistemic responsibility."* This includes a number of norms, or standards for judgment, that have to be taken into account if informing in FPIC processes is to be successful.[633] Firstly, given that we cannot check every fact that is communicated to us, we have to *rely* upon, and *trust* other parties as sources of knowledge.[634] Secondly, and contrary to the conduit/container model, the agency model of epistemically responsible communication requires that we view communicative transaction as a rich and complex, *two way exchange* through which agent X may come to adjust her cognitive commitments in line with agent Y's.[635] Thirdly, apart from the fact that a speaker needs to be competent, need to be capable of speaking a language, is truthful, has reasons for taking what she claims to be true, and is willing to share these reasons with others, good communicative practice must also be *relevant* to the intended audience. Communicative transactions thus ought to be sensitive to others' commitments to acquire relevant knowledge.[636] Fourthly, good communication takes account of what others already know, and of what they want and need to know at that time, in that context. Epistemically adequate communication is relevant communication, and has to be limited to what is appropriate to the actual context. Good communicative practice therefore always involves *withholding information*; comprehensible, true, grounded information – that could have been conveyed.[637] This way, it becomes clear that requiring "full information" is neither possible nor desirable.

Of course, these are just a few - albeit very important - norms that should be guiding in respect of the informed requirement. Other standards include those that make information accessible, intelligible, adequately accurate, and assessable by intended audiences. [638]

Manson and O'Neill rightly argued that these are all constitutive norms of communication and that these norms also set standards in the light of which communication can either succeed or fail seriously. Both failure to adhere to these norms and the assumption that others are not living up to them may undermine communicative transactions. If these norms are flouted or disregarded, either no information will be conveyed or what is conveyed will be irrelevant or unreliable. These requirements remain hidden under the conduit/

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632 Manson and O'Neill, 2007, pp. 58-59.
633 Manson and O'Neill, 2007, p. 61.
634 Manson and O'Neill, 2007, p. 61.
635 Manson and O'Neill, 2007, p. 62.
636 Manson and O'Neill, 2007, p. 63.
637 Manson and O'Neill, 2007, p. 63.
638 Manson and O'Neill, 2007, p. 64.

container model, and subsequently under an informed requirement that focuses only on informational disclosure.[639]

Summary: An Agent Based Theory of Communication

there are two distinct models of thinking about informing and communicating. Firstly, the conduit/container model and secondly, the agency or agent based model. Manson and O'Neill did not argue that the former model is entirely mistaken; they simply illustrated that the conduit model hides too much that is relevant in communicative action.[640] This is highly important to FPIC procedures, because it reveals that "informing" is more complex than some accounts indicate. It does not just mean that someone should unilaterally convey a "piece" or "chunk" of information to a recipient.

The agency model can be viewed as simply making explicit or highlighting aspects of communication and information that are ignored or hidden on the conduit/container model. Attention is drawn to the fact that a great deal of communication is done by and between agents. Communication, Manson and O'Neill explained, is a normative affair that presupposes a rich framework of shared norms, and shared background commitments as well as the requisite inferential competences. There is a wide variety of norms, epistemic and ethical, that are important for successful communicative action.[641]

The agency based model does not view information as some kind of "stuff" or "content" of communication: once *the importance of agents* in communicative transactions is recognized, it becomes clear that information is a term that is parasitic upon, and derived from, certain kinds communicative action. Acts of informing are typically inferentially fertile; when you tell someone something, you license them to make a large number of inferences about that statement.[642]

This has serious consequences for the way "informing" is to be perceived. The agent based model views *information* as only the content of a broader framework of *informing*, and such communicative transactions succeed only where participants are sensitive to one another as agents with their own cognitive and practical commitments, and assume one another's adherence to a range of communicative epistemic and ethical norms.[643]

Manson and O'Neill's main argument was that it is all too easy to think about information and communication in a way that fails to give due weight to the rich but implicit, social, rational inferential, and normative framework that is essential for communication – including acts of informing, and thus information – to take place.

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[639] Manson and O'Neill, 2007, p. 64.
[640] Manson and O'Neill, 2007, p. 65.
[641] Manson and O'Neill, 2007, p. 65.
[642] Manson and O'Neill, 2007, p. 66.
[643] Manson and O'Neill, 2007, p. 66.

III.3.3.3 Informed Consent: Justification, Role and Function

By illustrating two different models of information and communication, Manson and O'Neill aimed to pave the way for enriching the current debate on informed consent. The standard way, the conduit/container model, by which informing is discussed in abstraction from the agent and speech acts involved, regards information as "flowing" or being "transferred" between agents. The message of content is highlighted in this model, but the act of communicating is hidden.[644]

By contrast, the agency model focuses not only on content, but also on the speech acts by which agents communicate proposals, understand others' proposals and respond to them. This model takes account both of what is *said* – the speech content – and of what is *done* – the speech act – which recognizes the transactional or interactive character of successful communication.[645]

These models provide different conceptions of consent: in the conduit/container model, informed consent is focused on disclosure for decision making, which hides other elements that are essential for giving or refusing consent. The agency model locates informed consent in communicative transactions between agents.[646] This way, it provides a framework for a *transactional model* of informed consent, which emphasizes what is said and what is done both by those who request consent, and by those who respond by giving or refusing their consent.[647]

Justifications and Functions of FPIC: Consent as Waiver

Informed consent is a distinctive type of communicative transaction – one that is typically used to *waive* important ethical, legal, and other requirements in limited ways in particular contexts.[648] We have already explored this earlier in this study, where it was argued that informed consent is not a stand-alone concept, but that it is always dependent upon other, more fundamental norms, such as the right to land, resources, or self-determination in general. Its application is always reliant upon its underlying values, norms or rights, and these may of course differ substantially.

In consenting to a certain proposition, we waive certain requirements or rights that we have in relation to others not to treat us in certain ways. We set aside certain expectations, or license action that would otherwise be ethically or legally unacceptable. Informed consent thus has a role only where activity is already subject to ethical, legal, or other requirements and the question of setting them aside arises.[649]

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644 Manson and O'Neill, 2007, p. 68.
645 Manson and O'Neill, 2007, p. 69.
646 Manson and O'Neill, 2007, p. 69.
647 Manson and O'Neill, 2007, p. 69.
648 Manson and O'Neill, 2007, p. 72.
649 Manson and O'Neill, 2007, pp. 72-73.

"Consenting" thus justifies acts that would *otherwise* be unacceptable, or illegitimate. Waiving prohibitions on wrongful action and waiving legitimate expectations is a normal practice by which we permit selected others to act in ways that would otherwise be unacceptable, and thereby justify their action.[650] Manson and O'Neill confirmed that any justification of informed consent therefore has to start from recognition of the *underlying legal and ethical claims* and legitimate expectations that are waived by consent transactions.[651] This may seem like an obvious point, but it is sometimes forgotten in contemporary discussions on FPIC.

Consent requirements may offer a *routine* way of obtaining a limited waiver of requirements that are generally inviolable. They confer a special right – a permission – on certain agents to act in ways that would otherwise be prohibited. Consent may not be sufficient to waive such norms in all cases, but it functions as a reliable way for waiving certain standards.

Consent can thus be perceived as a procedural justification for some action that would otherwise count as illegitimate and which subsequently amounts to a change in position or a new relationship. Therefore, in addition to consent as a *defense* against a breach of rights, it can also function to create new rights and duties.[652] The conception that consent neutralizes what would otherwise be a wrongful activity – a waiver – and may subsequently provide the basis for a new relationship can be seen as its two core *functions*.[653]

informed consent justifies action *only* against the background of other important ethical and legal norms and it is used to give limited permission to act and intervene in ways that would otherwise do wrong to others, or otherwise fail to meet legitimate expectations.[654] This observation is as valid for the field of biomedical practice as it is for the field of the international protection of indigenous peoples.

Scope and Standards: The Need for Flexibility

While consent is important, it does not have to be sought and given in a uniform way or adhere to a uniform standard.[655] Since consent requirements presuppose other, more basic ethical and legal standards, procedures for

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650 Manson and O'Neill, 2007, pp. 72–73.

651 Manson and O'Neill, 2007, p. 73. Again, this is highly relevant for FPIC, since it is not very useful to examine it in isolation. The underlying claims, to land, property, and self-determination have to be recognized and examined. It is not only "self-determination" that forms the normative justification for FPIC, but also the specific other provisions and rights that are at stake. Recognizing and mapping the relevant spectrum of rights that is possible infringed if FPIC is not secured is of the essence for successful FPIC processes.

652 Brownsword R and Beyleveld D, *Consent in the Law* (Oxford, Hart, 2007), Ch. I, p. 7.

653 Brownsword R and Beyleveld D, *Consent in the Law* (Oxford, Hart, 2007), Ch. I, p. 6 & Ch. XI, p. 4.

654 Manson and O'Neill, 2007, pp. 76–77.

655 Manson and O'Neill, 2007, pp. 77–78.

consenting and the specificity of consent sought and obtained must both take account of the underlying norms that are to be waived in particular cases.[656]

To give one example, procedures and specificity of FPIC may and should differ greatly when a large mining project is proposed in the middle of an indigenous community's traditional territory, or when a small logging concession is planned that would only affect a distant part of a community's forest. Obviously, FPIC is important in both examples.

informed consent is important only when a proposed intervention would violate important norms, or disrupt a legitimate expectation. Manson and O'Neill argued that the scope of informed consent requirements is set by a range of norms which must be waived or set aside if the proposed intrusion is to become acceptable. [657]

Manson and O'Neill referred to the Nuremberg and Helsinki codes, which proposed a single set of standards, applicable to all research and medical interventions, to be met by informed consent requirements. Where the Nuremberg criteria set an arguably too low standard, the Helsinki requirements may be just too demanding. Difficulties arising from both views indicate that it is pointless to look for uniform standards for all informed consent transactions, for all consent procedures, or for all consent forms.

If there are no uniform standards, trying to fix the scope of informed consent requirements in the abstract may be pointless, and have little chance of success.[658] Adequate consent requirements may legitimately differ for different sorts of intrusive action, depending on the norms that would otherwise be breached. Therefore, the thought that a single standard can be set for all research, and by analogy for FPIC requirements in relation to indigenous peoples, is illusory.[659]

As Brownsword and Beyleveld have repeatedly emphasized: "the lifeline offered by consent as a justification should not be abused." They argued against the "routinization" of consent and stress that safeguarding the adequacy of consent is essential.[660] Consent is susceptible to abuse, and therefore it is of the essence that it is indeed provided in a manner that can be qualified as free and informed.

More demanding standards may be relevant where the impact and broader content of proposed actions are more difficult to understand, where going ahead without consent would violate important norms, and where risks are high. This is in line with how FPIC is conceived in this study, as a concept that is flexible, and may be a more demanding requirement when certain intrusions have a larger impact. The building of a large hydroelectric dam, for instance, may involve complex technical prognoses and details that, depending on the impact,

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656 Manson and O'Neill, 2007, p. 78.
657 Manson and O'Neill, 2007, p. 79.
658 Manson and O'Neill, 2007, p. 80.
659 Manson and O'Neill, 2007, p. 80.
660 Brownsword R and Beyleveld D, *Consent in the Law* (Oxford, Hart, 2007), p. 63.

may require far more elaborate consultation processes than the construction of a road.

Those who consent to any particular action thus need to know what the implications will be, what risks they may run, and what benefits will be gained. In complex, risky, and unfamiliar cases there may be good reasons to seek relatively explicit and relatively specific consent.[661]

However, a blanket approach to consent requirements that seeks to standardize procedures for consent for all action shows a lack of understanding of the reasons why consent matters. Consent is a way of ensuring that those subjected to invasive action are not abused, manipulated, undermined, or wronged in comparably serious ways.[662] It seeks to ensure that such action is done only when specific norms are waived, and is not undertaken if it would breach important ethical or legal requirements.[663] And this is as much true for FPIC in the context of indigenous rights as it is in relation to the field of bioethics.

This aim of FPIC cannot be secured by making consent disclosures more and more "complete," or by tailoring them to some uniform standard: what matters will vary depending on the case at hand; and more is not always better.[664] Obviously, indigenous representatives are not to be flooded with technical details that obscure the most relevant points of certain propositions, and the way or frequency in which consent is to be given may of course differ greatly with the nature and duration of the proposed project, plan or decision.

Cases vary immensely, and while standardized consent procedures and forms may be useful for certain ranges of cases, there is no reason to think that standardized procedures – let alone the same procedures – will be adequate in all cases.[665] A flexible interpretation of FPIC is therefore needed.[666]

In short, there is no simple way of fixing the scope of consent requirements. Equally, there is no simple way of fixing the standards for consent procedures; consent procedures must be robust enough to ensure that action that would otherwise breach norms is not performed unless those norms have been waived, and this most certainly demands different standards in different cases.[667]
Informed consent is indeed a secondary concept, and lacks a context unless the other norms and standards on which it is predatory are recognized and examined.[668] It is the impact of the proposed intrusion on those other norms and standards that further determine the scope of FPIC.

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661 Manson and O'Neill, 2007, p. 82.
662 Manson and O'Neill, 2007, p. 82.
663 Manson and O'Neill, 2007, p. 82.
664 Manson and O'Neill, 2007, p. 82.
665 Manson and O'Neill, 2007, p. 83.
666 While more clarity is needed concerning FPIC, this cannot be achieved by means of ever more stringent and uniforms norms.
667 Manson and O'Neill, 2007, p. 83.
668 Manson and O'Neill, 2007, p. 84.

III.3.3.4 Informed Consent Processes: Standards for Successful Communicative Transactions

Where consent is invoked to waive other ethical or legal norms, it must be requested and given in ways that meet certain standards. It was agreed upon that it is not possible to set uniform standards, but certainly a range of considerations can be given that are relevant if the communicative transactions by which consent is sought, given, or refused are to succeed.[669]

Since informed consent transactions are specific communicative transactions, they must also respect those norms that are required or important for successful communication. As was illustrated, successful communication must use a language that its audiences can follow, so that what is said is *intelligible*. It must also be *relevant* to its audiences, rather than for instance overwhelming. The communicating parties must also have some grasp of each other's backgrounds and - for our purposes particularly important – cultural context, if they are to communicate in ways that are relevant and intelligible.[670]

But intelligibility and relevance are sometimes not enough for successful communication; speech acts that make truth-claims aim to inform and tell their audiences about something. They succeed only when they respect specific *epistemic* norms, in particular norms of truth and truthfulness.[671]

According to Manson and O'Neill, norms of truth and truthfulness are perhaps best thought of as *regulative* rather than *constitutive* norms for making and responding to truth-claims and responses, since their violation does not invariably undermine but rather disrupts and damages both communication of truth-claims and responses to others' truth-claims. For these reasons, audiences are often cautious about others' truth-claims regarding accuracy or honesty.[672] Indigenous communities may often have good reasons for being cautious about information given by - for instance - mining companies, in light of earlier experiences.

What matters, is a core of norms of truth and truthfulness: communication of intelligible truth-claims is normatively adequate, provided it is at least adequately accurate for the purposes at hand and not dishonest.[673]

Informed consent transactions are communicative transactions that include truth-claims; for example, when a company makes certain statements about the environmental impact of a mining project. These transactions will therefore succeed only if the various parties are what Manson and O'Neill described as epistemically responsible. Consent transactions require agents to respect the epistemic norms that are required for successful communication, including not only norms of intelligibility and relevance but also norms for making,

669 Manson and O'Neill, 2007, p. 84.
670 Manson and O'Neill, 2007, p. 85.
671 Manson and O'Neill, 2007, p. 85.
672 Manson and O'Neill, 2007, p. 86.
673 Manson and O'Neill, 2007, pp. 86-87.

understanding, and responding to truth-claims.[674] Any request for consent will include some account of a proposed action or intervention and of the effects – including risks and benefits – that are thought likely.[675] Therefore, informed consent transactions incorporate truth-claims, and they will only succeed if they respect the norms for making successful truth-claims. [676]

Disclosure alone is not sufficient for successful communicative transactions, and it is in particular not enough for successful informed consent transactions. [677] In effect, Manson and O'Neill remarked, the notion of informed consent is a pleonasm; uninformed consent is not really a type of consent, since it is based on unintelligible, irrelevant, or inaccurate truth-claims.[678]

Speech acts are often used to make, adjust, and convey practical and cognitive *commitments*. Consent transactions are not merely exchanges of semantic content. They consist of speech-acts by which each party both communicates with the other, reveals and makes commitments. Requests for consent are made in speech acts that communicate *what* is proposed, and *that* the proposers commit themselves to act in accordance with any consent given, and not otherwise. Those who consent to others' proposals do so in speech acts that convey that they understand what is proposed and that they commit themselves to view subsequent action that accords with those proposals as acceptable.[679]

More specifically, those who seek others' consent communicate proposals that include truth-claims about proposed action, and commit themselves to act in accordance with their proposal if consent is given. The speech acts by which consent is *sought* have a dual function: (a) to *communicate* the content of a proposal, and (b) to make a *conditional commitment*.[680]

Speech acts by which consent is *given or refused* have three functions: (a) they communicate the subject's grasp of what was proposed, (b) they make or refuse to make a conditional commitment, and (c) they communicate that commitment.[681] Such acts request, give, or refuse consent and fail unless they meet the standards needed for effective communication of the content

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674 Manson and O'Neill, 2007, p. 87.

675 Again, think about the example of a mining project on indigenous lands, where company representatives inform an indigenous community about their proposition to build the mine *on their territory* and make statements about what the results will be for the environment and what kind of benefits the community might gain.

676 Manson and O'Neill, 2007, p. 87.

677 Manson and O'Neill, 2007, p. 88. The Conduit/Container model neglects agency and downplays or hides some of the distinctive norms that must be met by effective communicative transactions – in particular those that are essential for understanding and responding to the truth-claims contained within informed consent transactions. These truth-claims thus need to be *adequately accurate*.

678 Manson and O'Neill, 2007, pp. 88-89.

679 Manson and O'Neill, 2007, p. 90.

680 Manson and O'Neill, 2007, pp. 90-91.

681 Manson and O'Neill, 2007, p. 91.

conveyed, and those necessary for making the relevant (conditional) commitments.[682]

Manson and O'Neill made an important point in stating that for successful FPIC processes, parties have an *obligation to communicate*. This is in line with what is argued throughout this study: What is key for successful FPIC processes is the obligation – of all parties – to establish a good dialogue.

Once consent is given or refused, requesters in turn must respond appropriately to respondents.[683] FPIC is a process of taking turns, an intercultural dialogue in which parties enjoy discourse friendly relations and therefore discursive control.

Manson and O'Neill concluded with stating that informed consent is achieved only when both parties respect both the epistemic norms that are relevant to communicative transactions, and the ethical norms that are relevant to making commitments.[684]

Summary: Information and Communication in Informed Consent Processes

Manson and O'Neill's reconceptualization of informed consent as a particular type of communicative transaction can be summarized as follows. Manson and O'Neill proposed an agency model for thinking about informed consent transactions. They use this to explain the role of informed consent and the surrounding standards that matter for its successful application. By thinking of consent as waiving important norms, it becomes clear that it can never provide a complete justification for action, since it presupposes other, more important, ethical, legal or professional standards, norms and rules.[685] This is why it is so essential to map the rights and norms over which consent is to be given or refused; informed consent transactions are seen as waiving those standards, norms and rules in a limited way, for a limited time.

This understanding of informed consent transactions affirms the importance of informed consent, and gives a valuable insight into the *role* of FPIC. It traces its importance to the way in which informed consent transactions can provide (a) protection against serious wrongs, (b) evidence that violations of rights have not occurred, and (c) assurance that systematic ways of preventing these violations are in place.[686]

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682 Manson and O'Neill, 2007, p. 91. Manson and O'Neill explain that these standards, as exposed above, include a range of substantive and demanding epistemic standards, which set clearer and more differentiated standards for requesting informed consent that are set by appeals to respect autonomy, or by unrealizable aspirations to make consenting wholly explicit or specific.

683 Manson and O'Neill, 2007, p. 92. These points are also directly relevant to FPIC for indigenous peoples, where they are often unaware of their rights and lack the capacity to defend those rights.

684 Manson and O'Neill, 2007, p. 93.

685 Manson and O'Neill, 2007, p. 95.

686 Manson and O'Neill, 2007, p. 96.

Successful consent transactions can protect against serious wrongs, by placing control of invasive interventions that might otherwise in the hands of those who would be wronged or harmed. Only those whose consent is requested can waive the norms at stake. When such norms are waived, those who consent provide *evidence* that can later be cited to show that no serious wrongs have occurred, and used by those who perform invasive interventions to justify their action. The systematic use of informed consent can provide *assurance* to third parties that action that would otherwise be seriously wrong is routinely prevented. Conversely, without *free* and *informed* consent requirements, individuals or groups may not be protected against force or fraud, deceit or duress, constraint or coercion.[687]

In brief, Manson and O'Neill argued that consent can be used to waive important norms, rules, and standards, and so it has considerable ethical importance. However, since its use always presupposes whichever norm is to be waived, it cannot be the only normative justification of a proposed project, action or decision.

Manson and O'Neill warned that thinking about consent can become distorted and unrealistic if certain deeply entrenched ways of thinking about information and communication are taken too literally.[688] Manson and O'Neill's theory on informed consent as communicative transactions provides valuable insights into what is meant by the "informed" requirement in FPIC for indigenous peoples and disentangles the role of informed consent as a whole.

III.3.3.5 Conclusions: Informed Consent in Bioethics and FPIC for Indigenous Peoples

The similarities between "informing" in informed consent requirements in bioethics and in relation to indigenous peoples have already been mentioned throughout these paragraphs. In principle, all that has been said about informed consent in the context of Manson and O'Neill's 2007 study is directly relevant for "indigenous FPIC."They started from the point that informed consent cannot be achieved, and therefore cannot be required, unless it sets *feasible standards* for those who are to seek, give, or refuse consent. They indicated that this may look like a trivial point, but that it is widely ignored.[689] Indeed, this is a vital point and one of the elements of the central research question in the present work. If FPIC is to be successfully implemented, and enforces indigenous peoples' position in relevant decision-making processes, the standard setting must be capable of being met. Realistic implementation models must be developed. The feasibility of these models will be discussed in Part V of this study.

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687 Manson and O'Neill, 2007, p. 96.
688 Manson and O'Nelil, 2007, p. 149.
689 Manson and O'Neill, 2007, p. 184.

Most discussions on informed consent in bioethics and, as was illustrated also beyond, in relation to indigenous peoples, focus rather narrowly on the *disclosure of information* by those who seek consent and on *decision-making* by those whose consent is sought. Throughout Part III of this study, it was argued that the emphasis is not only on outcome, but on the *process* itself. This is fundamental to successful FPIC processes. It was argued that this process should recognize cultural similarities and differences and in an intercultural dialogue guided by principles of mutual recognition, continuity, and consent, in which discourse-friendly interaction preserves the freedom of the parties. FPIC is more about a process of participation than it is about a single moment of decision-making.

This paragraph described that what is actually required by the "informed criterion" is *effective communication* and *commitments* between the parties.[690] For anyone involved in FPIC processes, it is important to not only focus on informational disclosure, but also on the how communication takes place. A balanced, culturally appropriate model of adequate communication is vital for successful communicative transactions in FPIC processes.

A more convincing account of the "informed" requirement and informed consent in general should focus on the communicative transactions by which it is sought, given, and refused. Each element of a successful informed consent transaction must meet adequate standards.[691]

Genuine *informed* consent cannot be achieved by communicative transactions that do not take into account norms of *intelligibility* and *relevance*; those norms are essential for effective communication. Moreover, Manson and O'Neill persuasively argued that a number of epistemic and ethical norms, including norms of *accuracy* and *honesty*, must also be met. Essential features of successful communication include that parties share a *language*, share at least some *background knowledge*, and are able to take each other's *inferences* and *commitments* into account. This is to be guiding for successful application of the "informed" requirement.

Beyond "informing" the broader concept of informed consent is seen not merely as desirable and important, but as a standard way of avoiding breaches of significant obligations. Consent is important where interventions would *otherwise* breach underlying obligations and corresponding rights. Consent thus provides a way of *waiving* such obligations and rights.

Informed consent transactions are used to waive other requirements in *specific ways* and for *specific purposes*. Informed consent has a role to play only where

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690 Manson and O'Neill, 2007, p. 184. The Conduit/Container metaphors and the 'disclosure view on informed consent' are not mistaken in themselves, but they highlight and accentuate some aspects of knowledge and communication by hiding or downplaying others. Disclosure by itself may fail to reach its intended audience, and fail to communicate what is proposed. Decision-making by itself may fail to communicate whether consent is given or refused or which commitments are assumed in consenting. The disclosure model, according to Manson and O'Neill contributes to a partial and inadequate view of communication, and therefore of informed consent.

691 Manson and O'Neill, 2007, p. 184.

certain underlying requirements, such as ethical, legal, and professional obligations and legitimate expectations of various sorts, are accepted. In this study we have identified a number of the most important international legal norms for indigenous peoples in Part II.

When these norms are waived by giving consent, they are not discarded or marginalized; they are merely waived in limited ways, for a limited time, for a limited purpose.[692]

In this way the Manson and O'Neill debate sheds light on what exactly the *functions* of FPIC are. Informed consent *matters* because it offers a standard (though not a uniform one) and controllable way of setting aside obligations and prohibitions for limited and specific purposes. In specific circumstances, there might be good reasons to waive certain rights and obligations. Informed consent is used where an agent has reason to permit derogation from a significant obligation or expectation that would otherwise be breached.[693] FPIC is therefore a way of granting permission for such, otherwise intrusive, action. When consent is viewed in light of the norms, values or rights it is concerned with, it becomes clear that its content may vary depending on the *rights at stake* and the *impact* of the proposed intrusion.

In line with what was explored earlier – in the paragraphs on Tully's intercultural dialogue – it was argued that there is a need for a flexible interpretation of self-rule standards like FPIC and that especially the procedure itself should be open to re-negotiation. Searching for a fixed, uniform standard for FPIC processes is neither realistic nor desirable. Its scope is determined – in a practical dialogue – on a case-by-case basis. There can be no single standard for the content and way in which information is transferred and disclosed.

It is communication to relevant audiences that matters, besides disclosure and dissemination.[694] These paragraphs explained that "informing" should be understood more broadly. FPIC is about a communicative process in which all parties are involved and heard, and have the opportunity to reciprocate acts of informing. In short: The "informed" requirement applies to communicative transactions, and these transactions may be distorted when they are seen as bearing primarily on the informational or propositional content. Informed in FPIC thus means more than informational disclosure about a certain proposition. For successful *information*, and successful FPIC, it is essential that a wide range of norms that guide communicative transactions are taken into account.

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692 Manson and O'Neill, 2007, pp. 187-188. When FPIC is given, rights are thus not extinguished or deleted, but only waived, for the purposes and duration that is agreed upon in the FPIC process.

693 Manson and O'Neill, 2007, p. 188.

694 Manson and O'Neill, 2007, p. 199.

III.3.4 FPIC: Participation, Representation and Consent

The previous paragraphs have explored, more abstractly, what effective participation and free, prior and informed consent ideally amount to. Before turning to the examination of the application and content of FPIC in practice, in part VI and V, first some more general comments on FPIC and representation will be made. As was argued in the paragraphs on self-determination, a distinction is to be made between internal and external elements of indigenous participation, within the framework of the state. Self-determination, forms of effective participation, and FPIC share these internal and external elements, and have to some extent already been explored by the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism, in the framework of the United Nations.[695]

These paragraphs will explain the internal and external elements of FPIC processes and will indicate - broadly - what kind of issues should be held in mind in relation to representation. In part V, these elements of attention will be further examined in light of a number of practical examples of the problems that arise in this respect.

The main insight is that participation presupposes representation. There is no "we" without someone saying there is a "we." But how does the process of representation take shape in an FPIC procedure; who provides consent, to whom, and in which phase(s) of the process? How do the internal and external elements of representation influence each other, where consent is to be given by a community as a whole, entailing the participation of every member?[696]

Important questions that will be dealt with are: What are the problems that might occur in acts of representation and in obtaining consent? What are the particular difficulties related to consulting with, or obtaining consent from, an indigenous people? The present paragraphs will pose some introductory comments on these intricate questions that arise in relation to FPIC and representation.

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[695] A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010. A/HRC/EMRIP/2011/2, Final study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, 26 May 2011. A/HRC/18/43, Report of the Expert Mechanism on the Rights of Indigenous Peoples on its fourth session (Geneva, 11-15 July 2011), 19 August 2011. A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009. A/HRC/15/37, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 18 July 2010.

[696] See, IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002. Also see, IACHR, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R. (2004), October 12 2004.

III.3.4.1 Participation and Representation

Representation of indigenous peoples has always been one of the most complex issues in relation to safeguarding their rights. Van Genugten reiterated the point made by José Martínez Cobo in his landmark study: [697]

> The representation of indigenous peoples remains inadequate and is sometimes purely symbolic. The necessary measures must be taken to ensure that their representation in public office is genuine and just.[698]

Van Genugten explained that still – 30 years after the Cobo study – there is a wide gap between the standard setting, legally binding or not, and reality.[699] Cobo already mentioned in 1983 that:

> There are increasingly few provisions which discriminate against indigenous peoples in the sphere of political rights, and it is therefore in the de facto state of affairs that the reasons why indigenous peoples cannot effectively exercise their legally recognized rights must be sought.[700]

The main argument in this thesis is that in order for indigenous peoples' rights to become effective, there is a need for procedural and participatory arrangements that allow indigenous groups to have a fair say in decision-making processes of their concern.

Standards and laws that promote indigenous rights are meaningless unless they are implemented, and this can only happen if the indigenous communities themselves are fairly represented. Rodolfo Stavenhagen has stated, maybe somewhat cynically, that there is a major gap between legislation and practice. He stated: "If we look at the laws on the books and the accompanying rhetoric we may believe that indigenous peoples have indeed made enormous progress in the past few decades, but, alas, this is far from true."[701] Indigenous voices are still not heard, in spite of the legal standard setting and indigenous peoples are

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697 Genugten W J M van, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems', 104 Am. J. Int'l L, 2010, p. 47.

698 Study of the Problem of Discrimination Against Indigenous Populations, Final Report (Last Part),UN Doc. E/CN.4/Sub.2/1983/21/Add.8 (Sept. 30, 1983), paragraph 261.

699 Genugten W J M van, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems', 104 Am. J. Int'l L, 2010, p. 47.

700 Study of the Problem of Discrimination Against Indigenous Populations, Final Report (Last Part),UN Doc. E/CN.4/Sub.2/1983/21/Add.8 (Sept. 30, 1983), paragraph 257.

701 Stavenhagen R, 'Indigenous Peoples as New Citizens of the World' Latin American and Caribbean Ethnic Studies, 4:1, 2009, p. 2.

increasingly disappointed and frustrated.[702] Stavenhagen explained that this has lead to numerous protests and sometimes to their violent break-up by states. The main goal of FPIC, giving indigenous peoples a say and a strong voice in decisions that affect them, is clearly not met by standard setting alone.

Fair representation of indigenous peoples is an essential element for these participatory arrangements to be successful and FPIC therefore necessarily entails- different forms of - representation. Anna Meijknecht argued that "The mere existence of a will of minorities and indigenous peoples to exist as an entity and to preserve certain characteristics for future generations is not enough for its realization."[703] She explained that the space between existence of the will and expression and realization thereof needs to be bridged by intermediary structures.[704]

FPIC processes are meant to provide indigenous peoples with such "intermediary structures" to realize their right to self-determination. However, representation of a certain culturally distinct group remains a complex issue. While systems of direct democracy may work in small and coherent communities, in larger groups a form of representation is inevitably needed in order to express the will of the individuals in those groups.[705]

As was explored in the paragraphs on freedom, there are certain elements necessary for group agency and subsequently for the representation of the collective. Pettit explained that the group has to qualify as a "social integrate." These are intentional and personal subjects as far as they pursue certain goals as a collective, display a certain rational unity and can be expected to maintain their position. There must also be a basis for thinking of the collectivity as a subject that is rationally unified in such a way that within feasible limits and under favorable conditions, we can expect it to live up to the constraints of rationality.[706]

Pettit's requirements for group agency made clear that it is not so easy to form and maintain purposive groups. Indigenous communities, however, will often share collective purposes and will be inclined to maintain their commitments over time, especially when it comes to protection of their traditional territories and natural resources. Nevertheless, collective representation of the group is subject to a number of complex issues that relate to its *internal* and *external* aspects.

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[702] Stavenhagen R, 'Indigenous Peoples as New Citizens of the World' Latin American and Caribbean Ethnic Studies, 4:1, 2009, p. 2.

[703] Meijkecht A, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia – Hart, Antwerpen – Groningen – Oxford, 2001), p. 103. (Meijknecht, 2001)

[704] Meijknecht, 2001, p. 104.

[705] Meijknecht, 2001, p. 104.

[706] *See*, Pettit P, 'Rawls's Peoples', in Rex Martin and David Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia* (Blackwell, Oxford, 2006), pp. 38-56. *Also see*, Pettit, 2001, pp. 114-115.

The internal aspect relates to the internal procedures according to which representatives are chosen.[707] It is vital that the representatives are internally recognized as spokesmen or women of the group. Later on in this paragraph, it will be argued that in relation to such internal representation in FPIC processes, it is vital that culturally appropriate processes are followed, while ensuring that the voices of vulnerable groups within communities are also taken into account.

The external aspect bears on the recognition of the representative, and the group or community as a whole, by the external actors that take part in the relevant FPIC processes. Recognition is, as was explored in the paragraphs on James Tully's intercultural dialogue, a necessary precept for any participatory process to succeed.

Both the internal and external aspects of representation are essential to take into account for successful FPIC processes. The following paragraph will briefly examine some further insights on the external and internal elements of participation in the framework of the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism.

III.3.4.2 FPIC: External and Internal Representation

As was explored earlier in Part III of this study, effective participation and the duty to consult indigenous peoples imply that such consultations are undertaken in good faith and with the objective of achieving agreement or consent. An important conclusion is that FPIC is thus *always* relevant when indigenous peoples are consulted or are allowed to participate in decision-making. FPIC should always be the goal of processes of "effective participation."

The UN Declaration also provides that in general consultations with indigenous peoples are carried out in good faith in order to obtain their free, prior and informed consent. FPIC is thus a necessary element of the right to effective participation and the duty to consult.

The scope, nature, and objectives of such FPIC processes are shaped by the character of the right or interests at stake, the substantive rights involved. The proposed measure's impact also influences the character of the process.[708] Article 18 and 19 of the Declaration set out the general framework for such consultation processes:

> Article 18
>
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through **representatives chosen by themselves in accordance with their own procedures**, as well as to maintain and develop their own

[707] Meijknecht, 2001, p. 118.

[708] In part V, particularly when examining the Saramaka case, this will be explored in further detail.

indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned **through their own representative institutions** in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[709]

Both Articles reflect the internal and external elements that participation and FPIC entail, and stress that representation of indigenous peoples should take place through their own institutions and according to their own procedures and by representatives chosen by themselves. This may seem obvious, but unfortunately representation is often not in conformity with indigenous structures. Representatives may be "appointed" by external actors or consent may be "manufactured."[710] There is a clear link between FPIC and representation, and this is reflected in Article 19 of the UNDRIP, an important but heavily debated article.

Anaya argued that Article 19 should not be regarded as according indigenous peoples a veto-right over decisions that may affect them, but should be seen as requiring consent as the objective of consultations with indigenous peoples.[711] As is noted throughout this study, this observation is correct, and perceiving FPIC as an "all or nothing" concept is not in line with the spirit of the UN Declaration and the international indigenous peoples' movement in general, because their aim is to establish lasting and respectful relations between indigenous peoples and States. FPIC is about a genuine chance to influence the decision making process in time, and in a well-informed manner, without excessive external pressure. And without a system in which indigenous peoples are represented fairly, these goals cannot be met.

The power or significance of the objective of reaching agreement and consent necessarily varies according to the context and the interests involved, and so does the way in which indigenous peoples are represented.[712] Nevertheless, in certain contexts it may very well be that FPIC may harden into a requirement that implies that certain projects cannot be executed when indigenous consent is absent. ILO Convention No. 169 establishes such a hard

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[709] United Nations Declaration on the Rights of Indigenous Peoples, *A/RES/61/295*. Article 18 & 19, Emphasis added.

[710] *Cf.* Colchester M and McKay F, 'In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent', Forest Peoples Programme, 2004, p. 25 ff.

[711] A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 16.

[712] A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 16.

requirement in relation to the relocation of indigenous peoples and the in the UN Declaration two situations in which full consent is needed are indicated: with regard to relocation and the storage of hazardous or toxic waste.[713] A third situation has been elaborated upon by the Inter-American Court of Human Rights in the Saramaka People v. Suriname case. The precise scope of these requirements will be examined in Part V, when the legal roots of FPIC will be discussed. Nevertheless, it is good to observe at this point that the main goal of FPIC is not to give indigenous peoples a veto-power, but to integrate them in the decision-making processes that affect them. And this is impossible without fair representation.

Anaya made an important point in criticizing that: "in many situations the discussion over the duty to consult and the related principle of free, prior and informed consent have been framed in terms of whether or not indigenous peoples hold a veto power that they could wield to halt development processes."[714] It has been an obstacle in drafting and adopting the UN Declaration and continues to frustrate constructive debate about what it means and how to properly implement FPIC procedures.

The principles of consultation and consent are designed to facilitate a dialogue in which all parties can reach a satisfactory agreement. They do not "bestow on indigenous peoples a right to unilaterally impose their will on States when the latter act legitimately and faithfully in the public interest."[715] Indigenous peoples continue to be disproportionately affected by exclusion from decision-making processes, and consent coupled with its requirements "free, prior and informed" aim to secure that decisions affecting indigenous peoples are made under conditions of equality and striving for mutual respect and consensus. But there are a number of general and recurring issues that may hamper representation and participation of indigenous peoples in important decision-making processes. Some of the most important of these broad issues will be discussed next.

III.3.4.3 Difficulties with Representation and Obtaining Consent

For any effective FPIC regime, it is a necessity that indigenous peoples are represented fairly. This paragraph will discuss some of the issues that arise in this respect. While the case-law of the Inter-American Commission and Court will be discussed at length in Part V, the following citation will be used to clarify the

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713 ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entry into force 5 September 1991, article 16(2). United Nations Declaration on the Rights of Indigenous Peoples, UN A/RES/61/295, Article 10 & 29.

714 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 17.

715 A/HRC/12/34, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 15 July 2009, p. 17.

different issues with respect to obtaining consent and representation. In the case of the Dann sisters, the Commission hints at the internal and external elements of FPIC in explaining that determination of the scope of the right to property over traditional lands should be:

> […] based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.[716]

The Commission's statement illustrates that just like self-determination for indigenous peoples, FPIC has external and internal components. Externally, it is thus a people as a whole that ought to be represented, while internally the members of the community should all be able to participate in the collective will-formation.

These implementation requirements lead to at least three different interwoven issues that complicate the process of obtaining consent from the community or people. The purpose of this paragraph is merely to identify and to some degree describe these problems in order to indicate broadly the complexity of obtaining FPIC. The next three paragraphs will discuss three interwoven areas of concern: isolation, overlap, and internal participation.

III.3.4.3.1 Isolation

The first issue that will be mentioned is "isolation." There are still a number of indigenous communities living in *voluntary isolation*, most of them in the Amazon region and on West Papua.[717] These small groups have opted for a way of life separate from other people due to a variety of different factors. Two types of isolated peoples are commonly recognized: first, peoples whose isolation has been sustained and who remain isolated today, and second, isolated peoples who are in a "first contact" situation, but continue to resist contact with broader society. [718] It is extremely unlikely that there are tribes left whose existence is

[716] IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002, Paragraph 140.
[717] Others can be found on the North Sentinel Island near India and some people in South-East Asia. Estimations are that around 100 tribes worldwide qualify as 'uncontacted'. These are small communities that number from some 50 to 400 people.
[718] Convention on Biological Diversity, *Draft Report on Protecting the Rights of Indigenous and Local Communities Living in Voluntary Isolation*, NEP/CBD/WG8J/AG/2/5/ENGLISH, 16 April 2007, p. 3.

unknown to anyone else and "un-contacted" does not imply that these groups have no relations whatsoever with outsiders.[719]

Self-determination for these groups generally does not involve extensive participation. In this context it basically means that these tribes just want to be left alone, to practice their culture and traditions freely on their territory, developing at a pace chosen by themselves. Again, the most important element in the protection of these communities is secure use of their lands. These groups, especially in the Amazon region, suffer from illegal logging, oil and gas projects, mining industry, drug related crimes and a variety of other activities that intrude upon their lands.[720] Moreover, they are more susceptible to a number of diseases that outsiders can – and often do – bring with them.

While the concept of FPIC is aimed at protecting their territorial and cultural freedom, regarding obtaining consent it necessarily poses an *external infringement* as well. Indigenous peoples in general aspire to be – at least to some extent – autonomous, but communities living in voluntary isolation form a special category, which deserves an extra careful approach.[721]

Most probably,[722] communities living in voluntary isolation do so because of abhorrent experiences in earlier encounters with the outside world. They suffered from destruction of their lands caused by development projects, slave raids, and alien diseases (so called: "virgin soil epidemics").[723] They can be defined as indigenous groups that avoid or limit their relations with individuals and groups outside of their community.[724]

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719 See, Survival International: http://www.survivalinternational.org/articles/3109-questions-and-answers-uncontacted-tribes, consulted June 2012.

720 Finer M and others, 'Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples', 3 PLoS ONE, 2008, p 1.

721 It remains exceptionally difficult and unfeasible to distinguish between communities living in "absolute" voluntary isolation and an alternative form, e.g. "partial isolation." One could argue that voluntary isolation is almost always partial, since first-contact between indigenous communities and the "outside world" has almost always taken place, be it in recent history, or long ago. One could also reason that voluntariness (as a deliberate choice to remain isolated) implies the awareness of such an "outside world" per definition. On the negative impact of such a distinction in relation to Peruvian isolated communities see: Dora A. Napolitano & Aliya S. S. Ryan, *The Dilemma of contact: voluntary isolation and the impacts of gas exploitation on health and rights in the Kugapakori Nahua Reserve, Peruvian Amazon*, Environmental Research Letters, 2 (2007), doi:10.1088/1748-9326/2/4/045005, IOP Publishing Ltd, United Kingdom 2007. page 7.

722 Since information available about isolated peoples is, *per se*, either from retrospective testimony or second hand. See: Napolitano D A and Ryan A S S, 'The Dilemma of contact: voluntary isolation and the impacts of gas exploitation on health and rights in the Kugapakori Nahua Reserve, Peruvian Amazon', Environmental Research Letters, 2, doi:10.1088/1748-9326/2/4/045005, IOP Publishing Ltd, United Kingdom 2007, page 2.

723 Napolitano D A and Ryan A S S, 'The Dilemma of contact: voluntary isolation and the impacts of gas exploitation on health and rights in the Kugapakori Nahua Reserve, Peruvian Amazon', Environmental Research Letters, 2, doi:10.1088/1748-9326/2/4/045005, IOP Publishing Ltd, United Kingdom 2007, page 1.

724 Napolitano D A and Ryan A S S, 'The Dilemma of contact: voluntary isolation and the impacts of gas exploitation on health and rights in the Kugapakori Nahua Reserve, Peruvian

Forms of participation and FPIC processes are of course problematic in relation to these groups. Individual participation might prove hard, if not impossible, to monitor, assess, and verify in communities living in voluntary isolation. Establishing consent, or for that matter, proper consultation procedures, of any community "as a whole" might therefore be extremely difficult or impossible.

The problem is situated mainly in the *external* sphere of self-determination and participation, since there simply is no collective or individual will to participate in the larger political order. There could be other problems in relation to the *internal* dimension, however, these are difficult to determine. Problems within the internal sphere in relation to indigenous peoples living in voluntary isolation could arise within the context of participatory defects within illiberal communities. This subject will be dealt with later on in this paragraph.

Cultural interference should be avoided and obtaining "consent" in accordance with the indigenous people's own procedures, customs, and traditions of decision-making, might be extremely difficult.

Nevertheless, FPIC and self-determination in general are also devised with the purpose of enabling communities to freely live in (partial) voluntary isolation. As stated earlier, self-determination for indigenous peoples implies participatory and autonomy rights. A balance has to be struck, where the isolated communities are able to participate and make their voices heard, while securing their right to be left alone. [725] If possible at all, FPIC procedures have to be tailor-made to suit situations of voluntary isolation, constantly appreciating the precarious situation of these communities and preventing these procedures from becoming too interfering.

How such a procedure should take shape is anything but clear. Some argue that processes of consultation and consent are necessarily infringing the rights of isolated indigenous communities and therefore are undesirable altogether.[726] The Inter-American Development Bank appears to share this view. In its 2006 Operational Policy on Indigenous Peoples it specifically addresses the issue:

> In view of the exceptional nature of uncontacted indigenous peoples, also known as "peoples in voluntary isolation" as well as their special vulnerability and the **impossibility of applying prior consultation and good faith negotiation mechanisms**, the Bank will only finance projects that respect the right of these peoples to remain in said isolated condition and to live freely

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Amazon', Environmental Research Letters, 2, doi:10.1088/1748-9326/2/4/045005, IOP Publishing Ltd, United Kingdom 2007, page 1.

[725] Not to be taken literally; by choosing to live in voluntary isolation one could for example argue for an implicitly assumed position of non-consent, distilled from the community's behavioural pattern, in relation to development projects on their territories.

[726] Napolitano D A and Ryan A S S, 'The Dilemma of contact: voluntary isolation and the impacts of gas exploitation on health and rights in the Kugapakori Nahua Reserve, Peruvian Amazon', Environmental Research Letters, 2, doi:10.1088/1748-9326/2/4/045005, IOP Publishing Ltd, United Kingdom 2007, page 7.

> according to their culture. In order to safeguard the collective and individual physical, territorial, and cultural integrity of these peoples, projects that may have potential impacts on these peoples, their lands and territories, or their way of life will have to include the appropriate measures to recognize, respect and protect their lands and territories, environment, health and culture, and to avoid contact with them as a consequence of the project.[727]

Initiatives are taken in for instance Peru (Law 28736 on the protection of isolated peoples) and Ecuador (the creation of a 'Zona Intangible') to protect these groups from natural resource extraction and its negative impacts.[728] While there is virtually no participation or consultation possible, FPIC does play a role as an important principle, because it can be asserted from the behavior and customs of these tribes that they do not consent to infringements on their lands.

Peoples living in voluntary isolation are amongst the most vulnerable when they are affected by large-scale development projects on their territories. In this context, it is also often extremely difficult to implement a truly effective FPIC regime. The core external problem is that where FPIC and self-determination aim at protecting voluntary isolated communities from outside interference, their participatory components are generally not wanted, and might prove difficult to monitor and implement. Internally, verification of the representatives and the consent of the community as a whole is virtually impossible to monitor in any transparent manner.

One could wonder if contemporary international law is capable of dealing with the issues related to indigenous communities living in voluntary isolation, and how, *ad lege ferenda*, it should. In relation to FPIC, the stance taken in the CBD Draft Report on isolated communities seems appropriate. In the report it is stated that: "Cultural isolation is the expression of the exercise of free determination."[729] Clearly, the desire to be left alone should therefore be respected and seen as a logical component of the group's right to self-determination. For FPIC, this entails, as is stated in the Draft report's conclusions, the need to: "Recognize the condition of isolation as a form of negative consent (FPIC) to any form of intervention in the territories of the voluntary isolated peoples."[730] For the most isolated communities, this is indeed

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[727] Inter-American Development Bank, *Operational Policy on Indigenous Peoples (OP-765) and Strategy for Indigenous Development (GN-2387-5)*, Washington, 2006, O.P., page 9. Emphasis added.

[728] Finer M and others, 'Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples', 3 PLoS ONE, 2008, p 6.

[729] Convention on Biological Diversity, *Draft Report on Protecting the Rights of Indigenous and Local Communities Living in Voluntary Isolation*, NEP/CBD/WG8J/AG/2/5/ENGLISH, 16 April 2007, p. 3.

[730] Convention on Biological Diversity, *Draft Report on Protecting the Rights of Indigenous and Local Communities Living in Voluntary Isolation*, NEP/CBD/WG8J/AG/2/5/ENGLISH, 16 April 2007, p. 5.

the only way to proceed. However, these examples have a wider ring, as they illustrate a key-problem in all FPIC procedures.

A major issue in FPIC processes, and indeed a reason why FPIC is so important for indigenous peoples, is that the more isolated a community is the more difficult it is to obtain consent and to execute extensive consultation processes. The twin concepts of self-determination and FPIC are meant to give indigenous peoples more power to decide on their own lives, precisely *because* they are often isolated.

And this does not bear only on territorial forms of isolation, but on the widespread problem of social isolation of indigenous groups. The heart of the problem for indigenous groups is that they are often isolated in a myriad of ways. They are isolated from participation in decision-making processes, they are often isolated from benefits like running or clean water, electricity, or basic healthcare, they are isolated from - culturally appropriate - education, from access to the judiciary, from transparent and understandable governance, and so forth and so on.

In sum, the broad problem of "social isolation" of indigenous groups is the reason why there is such a need for FPIC and self-determination, while at the same time their isolated position in society makes it extremely difficult to obtain consent or to implement FPIC.[731]

III.3.4.3.2 Internal Participation

The second problem, which is situated in the internal sphere of FPIC, relates to the requirement that FPIC and self-determination respect the wishes of the indigenous people as a whole, which means that all members of the community should be able to participate in the decision-making. Indigenous peoples' rights are part of the broader body of human rights and can therefore only be realistically implemented if they fit and adhere to other fundamental human rights provisions.

The issue is thus related to what some call "illiberal indigenous communities" which can be defined as communities that internally do not adhere to internationally established human rights norms in relation to participation of marginalized groups living in these communities. The problem is also often described in terms of "illiberal practices." The issue is well known, and emphasizes the precariousness of the balance between self-determination as a right to freely practice one's own culture according to one's own customs and ways and the other side of the coin; that these customs and ways should be fair towards all members in the community.

One could think for instance of the position of women and youths within some indigenous communities. It is not inconceivable that some traditions and customs can be oppressive and unjust. In such situations, it appears to be difficult

731 The problem of isolation is thus mainly an 'external' problem, it bears on the relation between an indigenous people and external actors.

to comply with the requirements of effective participation of every individual member belonging to such marginalized groups within the community. This problem occurs within the *internal* sphere, i.e. within the indigenous nation itself. Externally, this might result in reluctance to accept indigenous representatives when they are evidently not chosen in a manner reconcilable with a (western) liberal conception of human rights and political participation. [732]

Two contemporary thinkers have elaborated on the question of how liberal theory should deal with illiberal peoples and where the boundaries of liberal tolerance are to be drawn. John Rawls addressed the issue in his "Law of Peoples," reasoning from a framework of a society of peoples.[733] Will Kymlicka, much influenced by Rawls,[734] covered similar ground,[735] although focusing more on a human rights centered approach, in his groundbreaking work on minority and group rights "Multicultural Citizenship."[736] For both authors, violation of the participatory rights of marginalized groups seems difficult to accept from a liberal point of view. Nevertheless, imposition of liberal values on illiberal communities does not appear to be easily justified.[737]

James Tully also reflected on this issue in "Strange Multiplicity" and argued that his system of contemporary constitutionalism does not "shield" illiberal

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732 For an excellent discussion on issues related to internal and external representation of Indigenous Peoples, see: Meijknecht, 2001, Chapter III, pp. 103 -114.

733 Rawls J, *The Law of Peoples* (Harvard University Press, Cambridge, Massachusetts, London, England, Fourth Printing, 2002).
According to Rawls, liberal peoples should tolerate and respect illiberal (decent) peoples as full and equal partners in his envisaged society of peoples, if they adhere to a number of requirements, amongst others a minimum floor of human rights, and an internal decent consultation hierarchy.

734 Van der Burg W and Pierik R, 'John Rawls: de filosoof van de liberaal-democratische verzorgingsstaat', NJB, Afl. 2003/18, 2003, At: http://njb.juriforum.nl, consulted August 2010.

735 Kymlicka notices that liberals have no automatic right to impose their views on non-liberal national minorities. In his opinion, however, liberals do have the right and even the responsibility to identify their views and thereby contributing to discourse between national groups, which should not be seen as the first step down the path of interference, but rather as the first step in starting a dialogue. See: Kymlicka W, *Multicultural Citizenship* (OUP, Oxford 1995), p. 171.

736 Kymlicka W, *Multicultural Citizenship* (OUP, Oxford 1995).
Kymlicka provided the debate on group or collective rights with a renewed impulse. For further discussion on this topic see: Kukathas C, 'Are There Any Cultural Rights?', Political Theory, Vol. 20, No. 1, February 1992. Also see: H Roth H I, 'Collective Rights, Justifications and Problems,' Centre for Multiethnic Research, Uppsala University, 1999. A more communitarian perspective is to be found in the writings of Charles Taylor and Vernon van Dyke.

737 See also: Singer P, *One World, the ethics of globalisation* (Second edition, Yale University Press, New Haven & London, 2004), pp 142 – 144. In exemplifying that if the establishment of a consensus on some principles of a common ethic would be possible, this would definitely not be a ground for justifying any form of political intervention. Singer rightly assumes that the mere fact that a regime is not democratic does not mean that any form of intervention should take place if there are no gross and systemic human rights violations taking place.

communities, as long as the three conventions – recognition, consent, and continuity – also count within the cultures and nations that claim cultural recognition.[738] In Tully's system, the internal and external components of participation are therefore also recognized. He further explained that appropriate forms of self-government also have the effect that they tend to *promote* democratic values within nations. Of course, vulnerable groups within certain cultures need adequate attention and protection. However, this is fortunately acknowledged in the international structures of indigenous peoples' protection.

For instance, the position of indigenous women and youths is an ongoing priority theme within the UNFPII framework.[739] Without going too far down the road of cultural interference, participation in FPIC procedures should indeed mean genuine participation by all members of the affected community, should they so desire. In the paragraphs on freedom, it was already mentioned that for collective agency, the group should be able to further a collective purpose. It is vital that such purposive social groups are indeed motivated by common goals, in which the internal participation is fairly arranged.

The issue of participation within illiberal communities is a delicate one, which should be handled with the utmost care and as much as possible in accordance with indigenous ways of decision-making. Nevertheless, it should always be kept in mind that realistic and effective implementation of FPIC processes should always take place with adherence to the broader framework of human rights.

III.3.4.3.3 Overlap

The final difficulty that will be mentioned in relation to representation and the implementation of FPIC, and which has both strong internal and external features, is the problem of *overlap*. As will be examined more closely in Part V, a precondition for implementing FPIC is an effective land rights regime, which creates a form of territoriality (entailing a positive obligation for the state to assist in delineating and demarcating indigenous lands) for indigenous and tribal peoples.[740] Obtaining consent of a community as a whole might prove to be problematic in a situation where there is overlap between communities, peoples and/or other entities.

However, there is a deeper problem related to overlap. This was discussed at length in the paragraphs on intercultural dialogue. Tully's insight that cultures are overlapping, interacting, and internally negotiated pinpointed the issue. If cultural identity is fluent and in constant motion, how can it be possible to genuinely represent such an identity? Tully's answer, as we have seen, was constructive. While this perception on culture does complicate cultural

738 Tully, 1995, p. 191.

739 The special theme of UNPFII's third session was the position of Indigenous Women, the special theme of the 4th session was the role of indigenous youth.

740 In Part V, the Inter-American Court's system of land and property rights for indigenous peoples will be examined in more detail.

recognition, it also makes it possible by the exposure of common ground. This common ground acts at a catalyst for an intercultural dialogue.

James Anaya also reflected upon this outdated conceptualization of cultures as "billiard balls" in the context of international law. He argues against the misconception of a world divided into mutually exclusive "sovereign" territorial communities.[741]

Anaya stated that the traditional Western theoretical perception is founded on an over-simplified assumption of a world divided into individuals and states. This is indicative of the classic, liberal, post-Westphalian model. In our envisaged modern world of peoples, living in pluri-cultural or multi-nation states, this conception ignores the need for special protection of certain culturally distinct groups, and appears to reject any concept of internal self-determination; i.e. the existence of a self-determining entity *inter* or *intra* state borders.

Anaya seemed to agree with Tully in saying that: "The limited conception of 'peoples', accordingly, largely ignores the multiple, overlapping spheres of community, authority, and interdependency that actually exist in the human experience."[742] As was discussed in the paragraphs on self-determination, Anaya argued that the human rights character of self-determination is obscured in this way, which in his view is the core argument for protecting indigenous peoples' rights. Nevertheless, the other and interwoven strain of argument argued for an indigenous right to self-determination - based on the assumption that indigenous peoples possess elements of sovereignty that predate the current political entity in which they are situated - should not be rejected.[743]

While rejecting a perception of cultures as fixed, closed off, and static, for self-determination and FPIC processes to apply, it is at least necessary to determine who is the people that is affected, in order to secure fair representation in decision-making. The overlapping and dynamic notion of cultures is a complex issue that has to be taken into account in FPIC processes.

Katsuhiko Masaki argued that this is indeed the "big problem" with FPIC procedures. Masaki asserted that the way FPIC is recognized in the Declaration presupposes a dichotomized view of the colonizer – colonized interface.[744] The central question in his excellent study is: If the identity of an indigenous community is hybrid, is it feasible to define a clear cut benchmark of "full consent," drawing on a "centered" image of deliberation – underlying the principle of FPIC – that regards decision making as a set of goal-oriented activities with a definite beginning and end?

Masaki illustrated the pitfalls involved in the dichotomized view of FPIC, by giving an example of the Pahadi and Tharu populations of Majuwa, Nepal. He argues that all sorts of intra and inter group relations and social circumstances

741 Anaya, 2004, page 101.
742 Anaya, 2004, page 101.
743 This line of argumentation has been explored at length in the paragraphs on self-determination.
744 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 70.

(like gender, status, party affiliation) complicate the perception of FPIC as entailing a centered image of decision-making.[745] His case study reveals a myriad of different interests and affiliations that complicate a single FPIC procedure.

Masaki stated that the Declaration advocates an "ideal situation," arbitrarily fixating indigenous peoples' consensus, while disregarding the multiple and fragmented nature of the members' subject positions.[746] He referred to Young, who calls for a decentered view of decision-making as mediated through and dispersed over time and space, giving prominence to flows and exchanges over different social actors, and avoiding a definite moment of decision.[747] We discussed that Tully is also skeptical about single and definite moments of decision-making, and that continuity and revision of decisions should be possible. Pettit argued, in a similar vein, that ex-post control over decisions is vital for a democratic regime that respects minority rights.

Masaki warned that both indigenous peoples and their "masters" hold multifaceted, incoherent identities and it is crucial to avoid dichotomizing a colonial relationship into two discrete, opposing forces. But it nevertheless remains crucial to promote FPIC, especially in relation to large-scale development projects – the effective participation in decision-making is invaluable for indigenous peoples. Masaki argued that a technical concern with the "procedures" of FPIC could divert the attention away from the larger workings of powers involved. He aims to expose an antinomy in the concept of FPIC: it seems fundamentally at odds with the principle of self-determination to "enlist" indigenous peoples through their acceptance of an externally conceived project.[748] It was already argued that the agenda setting in FPIC processes should not only be in hands of external actors. Indeed, it is essential for successful FPIC processes that indigenous peoples themselves also have a say in the setting of the agenda and the procedure that is to be followed. Masaki explained this eloquently: "When acting as rights holders – immersed in reciprocal relations by which the group is required to assimilate itself to existing norms governing how people gain recognition – the indigenous people are likely to exercise their rights *within parameters laid out by an external agent*."[749]

Avoiding that FPIC will lapse into what Masaki called a "political technology," is concerned with the adoption of a "decentered image of decision-making as mediated through and dispersed over time" (quoting Young's 2000 work, Inclusion and Democracy). Proponents of FPIC should not

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745 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 79.
746 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 71.
747 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p 71.
748 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 80.
749 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 81.

focus on the narrow, centered view that FPIC entails a step-by-step sequence of goal-oriented discussions.[750] He convincingly argued that restrictions on the scope of external interference might put the advantage too much into the hands of those (e.g. powerful multinationals) who can *best present* their "reasoned" arguments. Moreover, going through a determined set of deliberations to gain acceptance to a project potentially blurs *alternatives* by restricting one's options to one.[751] Proponents of FPIC might unintentionally get indigenous peoples to embrace externally conceived agendas, and could mistakenly position them as a unified entity.[752]

A downside of the decentered approach is that it is less amenable to outsider's blueprints, given the absence of a clear-cut beginning and a definite goal. But as Masaki argued, given the different positions of members of an indigenous community (economically, politically, socially etc.), and the dynamics of community, outside actors should realize that external interventions cannot be neutral and must be cautious about tailoring their support strategies to a particular unfolding of events.[753]

Masaki concluded that the impossibility of bringing peoples' struggles under decision-making control must be accepted and that a "straightjacket" FPIC strategy should be abandoned, if we are truly to act in accordance with the principle of indigenous self-determination, which - as is argued throughout this study - is the backbone and legitimization of FPIC.[754]

Overlapping and diverging interests, agendas, cultural identities, and affiliations complicate the application of FPIC especially in relation to representation. It may prove extremely hard to secure fair representation of the group(s) involved. But as was explored through Tully's work, acknowledgement of the dynamic overlapping nature of cultures also make it a real possibility to achieve cultural recognition. The complexities mentioned above should be taken into account, but certainly should not be a reason to abandon FPIC processes as "too difficult."The implementation of FPIC also leads to number of less abstract, practical problems related to overlap.

One could imagine an unlimited number of different territorial types of overlap. With regard to the *internal* dimension, one could envisage a situation where only a part of the community is negatively affected and the community as

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750 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 82. We will see in Part V that the Inter-American Ct. in the Saramaka case seems to adopt such a step-by-step approach. While Masaki's warnings are important, we should not interpret them as final obstacles for the implementation of FPIC, since this would completely paralyze decision-making.

751 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 82.

752 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 82.

753 Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 82.

754Hickey S and Mitlin D, (Eds.) *Rights-Based Approach to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009), p. 83.

a whole needs to consent to the decision, plan, or project affecting just the small part. For the larger part of the community or people, the project could be beneficial. In such cases, it would be essential for the representatives of the indigenous people concerned to take into account all different interests of the various groups constituting "the people."

However, the main problems related to overlap are situated in the *external* dimension of self-determination, between the collective entity constituting a people providing or withholding consent through their (freely chosen) representatives and other entities that cover parts of the same territory or autonomy sphere. Since the (self-determining) indigenous group is still part of a larger state, one could argue that there is always some sort of veil of state sovereignty over the indigenous sovereignty-sphere.[755]

Therefore, it may be extremely difficult to obtain consent of a community as a whole when the affected people territorially extends over several states.[756] Another form of overlap can be distinguished in situations where different "communities" or "peoples" coincide territorially or are affected by for example a large-scale development plan. Complex systems of representation may be needed to measure consent in such situations. A combination of the factors mentioned above can be found in urban areas, where there appears to be no option of "demarcating or delineating" territory. Another complication arises in the case of nomadic tribal peoples. The overlapping nature of culture is definitely one of the key concerns in making sure that FPIC processes succeed and are grounded in a genuinely representative participatory process.

III.3.4.4 Conclusions

While there is a strong movement that aims to develop FPIC into a genuine, effective, and enforceable legal norm, some fundamental issues remain that generate complexities in relation to its implementation. This paragraph has sought to illustrate these issues in light of the requirement of fair representation.

Participation presupposes representation. Standard setting is meaningless unless there are intermediate structures that facilitate practical implementation of those norms, and this is possible only if indigenous peoples are fairly represented. FPIC processes are devised to bridge this gap between standards and reality.

Both internal and external aspects of representation are important to take into account for successful FPIC processes. Articles 18 and 19 of the UN Declaration, which set out the general framework for indigenous participation, highlight these aspects. Externally, it is important that it truly is a people "as a whole" that is represented, while internally the members should be able to participate in the collective will-formation.

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[755] The main argument of New Zealand to vote against the U.N. Declaration was that the requirement of consent for Indigenous Peoples over the lands and territories they traditionally occupied could constitute a Veto-right over national legislation and potentially affect all the countries' territories.

[756] Like, for example, the Sami people of Scandinavia and Russia.

Different forms of *isolation* complicate representation and obtaining FPIC. The most isolated communities may be extra vulnerable, and FPIC processes should be conscious of this. At the same time, it is exactly this social isolation of indigenous groups that forms the reason for developing strong participatory mechanisms, like FPIC.

Internally, FPIC processes have to make sure that the voices of *vulnerable groups* within the community, for example women and youths, are taken into account, while at the same time it is vital that these internal processes can be conducted in a manner compatible with the cultural structures of the group. Appropriate forms of self-government and participation rights may have the effect of promoting democratic values within communities.

Since cultures are internally negotiated, interacting, and overlapping and since it is important to take the multiple overlapping spheres of community, authority and interdependency that exist in human experience into account, obtaining consent is a complex issue. Without taking into account these insights, FPIC becomes impossible to obtain. Perceiving FPIC as a single and centered moment of decision-making is undesirable since this may ignore that there are a myriad of intra and inter group relations and circumstances that play an important role. Cultural identity is dynamic, and this ought to be reflected in FPIC processes.

The complexities related to "overlap" complicate FPIC processes and representation of cultural identities, but should not be seen as a definite obstacle. Acknowledging overlap and devising FPIC structures that take this into account can expose common ground between the parties involved and may lead to real cultural recognition.

Colchester and Mckay described the two main challenges of "searching for the middle ground" and implementing FPIC as the need for mutually agreed negotiation processes and the necessity for indigenous peoples to agree about means to represent their own collectivities. [757]

Representation of indigenous communities in FPIC processes is a complex issue, but in recognizing the particular issues on a case-by-case basis, fair systems of representation can be devised that are respectful to both the cultural ways of indigenous groups and the broader body of international human rights norms. Strengthening the capacity of indigenous peoples to represent themselves is vital, and facilitation thereof is also part of their right to self-determination.

[757] Colchester M and McKay F, 'In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent', Forest Peoples Programme, 2004, p. 6.

III.4 Conclusions: Effective Participation and FPIC for Indigenous Peoples: Dialogue, Communication, and Consent in Multi-Nation States

Contemporary standard setting pertaining to indigenous peoples reflects a change in law and policy from protection against discrimination and integration into mainstream society towards recognizing rights to self-determination and concern for the protection of cultural integrity. Different mechanisms to promote effective participation of indigenous peoples – as distinct collectives – in decision-making processes are essential to accomplish adherence to these principles. Within this participatory framework, FPIC is emerging as one of the most important instruments for realizing indigenous peoples' right to self-determination. The preceding paragraphs described the main justifications for FPIC and show and expose how the concept is embedded in the broader framework of effective participation.

Part III therefore first examined the content and justifications for a norm of effective participation and subsequently evaluated the concept of FPIC from different – legally relevant – perspectives. The first part of this study illustrated that mechanisms for effective participation form the core of what self-determination means for indigenous peoples, since self-determination is to function primarily within the state, and does not amount to full autonomy or independence. These participatory structures are also vital for securing indigenous peoples control over their lands and resources, which will also be a major topic in Part IV and V of this study.

Effective Participation and FPIC

It was necessary to explore the underlying framework of participatory norms, standards and their justifications to come to terms with FPIC. Effective participation is becoming a central principle in the discussions about the international protection of indigenous peoples according to a number of recent UN studies on the rights to effective participation.

This is also reflected in the UNDRIP, which contains a number of different participatory mechanisms. These participatory, discursive provisions in the Declaration demarcate different levels of indigenous autonomy. Accordingly, effective participation is "layered" in the Declaration.

Moreover, the Special Rapporteur has stressed that a duty – for states – to consult indigenous peoples is a corollary to the right to effective participation. The principle of free, prior and informed consent takes a central place within the discussion on effective participation and helps to clarify the content and objective of these participatory norms. Moreover, an important argument is that FPIC could allow for a more targeted, realistic, and practical approach to the problems indigenous peoples face when it comes to including them in decision-making processes.

James Tully's study "Strange Multiplicity" was surveyed to answer the questions of why participation in the framework of the democratic processes of

the state is so vital and how this could be made possible. Tully's answer, which provides a framework for FPIC and effective participation processes, is that when negotiations between indigenous peoples and states are held in accordance with the principles of *mutual recognition*, *continuity,* and *consent*, they will be respectful of cultural differences, and this is the way to generate peaceful relations in multicultural states.

It was explained that the multiplicity of demands for cultural recognition currently present calls for a variety of forms of self-rule. In other words, there is a need for different forms of participation in decision-making, dependent upon the claims and interests at stake. Tully explains that the goal of these processes, which he rightly describes as dialogues, is to find common ground with diverse others who display both cultural similarities and differences.

To successfully conduct such a dialogue (or what Tully calls a multilogue), it is vital to listen to the descriptions and arguments of each party involved, in appropriate languages, in order to find re-descriptions acceptable to all. In this way, it becomes possible to mediate the differences that the different parties want each other to recognize.[758]

This intercultural dialogue is essential to realize the effective participation of indigenous peoples. Participants in a dialogue shaped according to Tully's principles are ideally gradually able to see the association from the points of view of each other and work out an acceptable inter-cultural language capable of accommodating the truth in each of their limited and complementary views, thereby setting aside the incompatible ones.[759] This is evidently the core purpose of FPIC and other participatory processes in which complex arrangements need to be discussed and high-impact decisions have to be made.

Tully's framework emphasizes the need for a flexible interpretation of self-rule standards. Especially the procedure itself should be open to re-negotiation. Searching for a fixed, uniform standard for FPIC and effective participation processes is neither realistic nor desirable. What is needed is an intercultural dialogue in which the culturally distinct ways of speaking and acting are mutually recognized, in order to reach agreement on the type of self-rule arrangements that fit the particular situation and cultural context. It is through and in this dialogue that people and peoples are to recognize each other's similarities and differences, in this process of mediation discover common ground, and reach agreement on appropriate types of self-rule. Effective participation of indigenous peoples in intercultural decision-making processes is rendered possible if it is guided by principles of mutual recognition, consent as the basis for concluding and altering arrangements and respect for the continuity of the relation over time.

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[758] Tully, 1995, p. 111.
[759] Tully, 1995, p. 134.

Elements of FPIC

Subsequently, the different elements of FPIC were surveyed from a number of different perspectives. First, the contemporary understanding of the different elements were exposed and it was shown that the most comprehensive explanation is to be found in the "elements of a common understanding of FPIC" included in the conclusions of the 2005 UNPFII Workshop report. Taking these descriptions as a vantage point, the different elements of FPIC were examined.

Free

The first question posed is: what could be understood by "free" in FPIC? Phillip Pettit's theory of freedom offers an attractive perspective on this element since it views freedom from an interpersonal perspective and explains that freedom can be guaranteed when an agent has sufficient discursive control in a dialogue or decision-making process. This is exactly what indigenous peoples need in FPIC processes.

It is essential that the agent is fit to be held responsible – in other words – a person must be effectively reactionworthy for a certain action to be seen as free. Intuitively, it is proper to speak of freedom when we can say that a person – or people – is responsible for a certain action or decision.

Discourse-friendly relationships preserve a person's freedom. It is essential for such relationships that the actor involved is recognized as a partner for discourse and is also authorized to take his place in the decision making process. Pettit called this capacity "discursive control" and when the group involved has sufficient discursive control in a decision making process, its freedom is preserved.

Agents in Pettit's view will be free persons to the extent that they have the ratiocinative capacity for discourse and the relational capacity that goes with enjoying discourse-friendly linkages with others. This capacity, with its dual aspects, is what constitutes discursive control. Agents will exercise such freedom as persons so far as they are engaged in discourse with others, being authorized as someone worthy of address, and they will be reinforced in that freedom so far as they are publicly recognized as having the discursive control it involves.[760]

Pettit furthermore illustrated that this concept of discursive control translates to the political arena in the form of a principle of non-domination, which is a central theme in both definitions and measures to protect indigenous peoples. If non-domination is upheld, this means that minority and indigenous groups are protected from state interference that amounts to arbitrary decision-making. Interference in this perception is arbitrary where it is not forced to track the

[760] Pettit explained that this view of freedom leaves no room for hostile coercion, but it does allow for a number of other coercive actions, like an offer, bid, or plea. Furthermore he argued that his theory also applies to groups, to collective agents (the same way it applies to individuals) as long as they count as social integrates.

avowable interests of the interferee. Secondly, non-domination indicts not only the experience of arbitrary interference, but any exposure to a power of arbitrary interference, whether or not that power is actually being exercised.[761] By targeting and condemning only arbitrary interference, the ideal of non-domination attempts to establish a polity that can possess coercive powers, but is so constrained that these powers tend not to be arbitrary.

Pettit acknowledged that this requires a new conception of democracy that is hospitable to minority and indigenous contestation rights. In his conception of democracy, multicultural nations have to establish special contestatory powers for such groups in order to preserve their political freedom, to prevent them from becoming dominated by the majority. This necessarily includes various self-government rights and participation rights, like FPIC.

Will Kymlicka describes these as mechanisms that protect minorities against the possible injustices of state nation building.[762] It was argued that these are tools to determine forms of self-rule by means of a "multilogue." Pettit argues that in order to accommodate such minority rights, the concept of electoral democracy needs to be supplemented with what he calls a contestatory dimension, in which special contestation rights, like FPIC are guaranteed for minority groups.

"Free" in free prior and informed consent is therefore best described as a sufficient degree of discursive control in the relevant decision-making processes. When indigenous peoples enjoy discursive control, they can be seen as fit to be held responsible for the choices they make. FPIC requires co-responsible decision-making. The concept of discursive control does not leave room for hostile coercion, while more friendly forms of coercion, like offers, pleas, and bids, are not ruled out. Politically, the notion of discursive control links up with the principle of non-domination, which is a central requirement for realizing indigenous peoples' right to self-determination.

Prior

Prior is an important requirement for any genuine FPIC process since enough time should be allocated for internal debate and decision-making according to a community's own cultural customs. Nevertheless, FPIC is not only relevant prior to any agreement between indigenous peoples and others, but is concerned with sustaining respectful relations over time. FPIC may include revision of existing arrangements in light of new information or changed circumstances.

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761 Pettit, 2001, p. 138-139. *Cf.* Taylors argument in his influential essay 'examining the politics of recognition'.

762 Instead of perceiving minority rights as a special status or privilege. Kymlicka W, *Politics in the Vernacular, Nationalism, Multiculturalism and Citizenship* (Oxford University Press, 2001), pp. 1-2.

Informed

In order to be able to freely consent to certain projects or arrangements, it is vital that indigenous peoples are adequately informed about the planned activity. While the final part of this study will examine in close detail what the *content* of these informational requirements is, this part examined another important part of informing, namely that informed consent processes require complex communicative transactions.[763] In this part it was studied – taking into account the extensive debate in the field of Bioethics – what standards are to be taken into account to conclude successful communicative transactions. Seen together with Tully's model for an intercultural dialogue and Pettit's notion of discursive control, this provides the outline for the dialogical model FPIC processes aim to achieve. Moreover, this part exposes why informed consent requirements matter and what legal role they fulfill in general.

The Role of FPIC and Standards for Communicative Transactions

Consenting concerns a *waiver* of other, more fundamental, entitlements. Since consenting may – and very often will – have profound effects on indigenous communities, it should be accompanied with certain standards – free, prior, informed – that secure its validity. The focus in FPIC processes should be as much on the way in which communication is taking place between indigenous peoples and other actors, as it should be on informational disclosure. Information should be identified as action rather than only as content, since informed consent processes involve much more than merely the transfer of information.

The *role of FPIC* is that it justifies acts that would otherwise be unacceptable or illegitimate. Waiving prohibitions on wrongful action and waiving legitimate expectations is a normal practice through which we permit selected others to act in ways that would otherwise be unacceptable, and thereby justify such actions or activities.[764] Any justification of informed consent therefore has to start with recognition of the underlying legal and ethical claims and legitimate expectations that are waived by consent transactions.[765] This is also the reason why the foundations of FPIC (self-determination and rights to lands and resources) were treated in detail at the beginning of this study. What also became clear is that in addition to consent as a defense against a breach of rights, it can also function to

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763 When examining the case law from the Inter-American Court and a number of Voluntary Initiatives and implementation models for FPIC in Part V, the specific content of the informational requirements will be exposed.

764 Manson and O'Neill, 2007, pp. 72–73.

765 Manson and O'Neill, 2007, p. 73. Again, this is highly relevant for FPIC, since it is not very useful to examine it in isolation. The underlying claims, to land, property and self-determination have to be recognized and examined. So it is not only 'self-determination' that forms the normative justification for FPIC, but also the specific other provisions and rights that are at stake. Recognizing and mapping the relevant spectrum of rights that is possible infringed if FPIC is not secured, is of the essence for successful FPIC processes.

create new rights and duties.[766] Since it is an expression of indigenous self-determination, FPIC also has a role in generating and sustaining relationships between indigenous peoples and states.

A blanket approach to consent requirements that seeks to standardize procedures for consent for all action is neither feasible nor desirable. Consent is a way of ensuring that those subjected to invasive action are not abused, manipulated or undermined, or wronged in comparably serious ways.[767] It seeks to ensure that such action is done only when specific norms are waived, and is not undertaken if it would breach important ethical or legal requirements.[768] And this is as much true for FPIC in the context of indigenous rights as it is in relation to the field of bioethics.

This survey of FPIC in the context of bioethics provides valuable insights into the *goals* and *effects* of FPIC. It traces its importance to the way in which informed consent transactions can provide (a) protection against serious wrongs, (b) evidence that such breaches have not occurred, and (c) assurance that systematic ways of preventing them are in place.[769]

Hence, successful consent transactions can *protect* against serious wrongs, by placing control of invasive interventions that might otherwise wrong and harm in the hands of those who would be wronged or harmed. Only those whose consent is requested can waive the norms or rights at stake. When such norms are waived, those who consent provide *evidence* that can later be cited to show that no serious wrongs have occurred, and the norms can used by those who perform invasive interventions to justify their action. The systematic use of informed consent can provide *assurance* to third parties that action that would otherwise be seriously wrong is routinely, normally, prevented. Conversely, without *free* and *informed* consent requirements, individuals or groups may not be protected against force or fraud, deceit or duress, constraint or hostile coercion.[770]

Secondly, FPIC is not only about "mere choice," but also entails a dialogical process that may also include a number of other considerations and principles that are relevant for its justification. It was discussed that a narrow focus on "informing" ignores or underplays what is actually needed for *effective communication* and *commitments* between the parties involved.[771] We have seen

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766 Brownsword R and Beyleveld D, *Consent in the Law* (Oxford, Hart, 2007), *Ch. I, p.* 7.
767 Manson and O'Neill, 2007, p. 82.
768 Manson and O'Neill, 2007, p. 82.
769 Manson and O'Neill, 2007, p. 96.
770 Manson and O'Neill, 2007, p. 96.
771 Manson and O'Neill, 2007, p. 184. The Conduit/Container metaphors and the 'disclosure view on informed consent' are not mistaken in themselves, but they highlight and accentuate some aspects of knowledge and communication by hiding or downplaying others. Disclosure by itself may fail to reach its intended audience, and fail to communicate what is proposed. Decision-making by itself may fail to communicate whether consent is given or refused or which commitments are assumed in consenting. The disclosure model, according to Manson and O'Neill contributes to a partial and inadequate view of communication, and therefore of informed consent.

that this far, requirements in relation to "informing" in FPIC processes for indigenous peoples, also focus mainly on informational disclosure. A more elaborate model of adequate communication is vital for successful communicative transactions in FPIC processes.

Rather than constructing informational obligations as bearing directly on types of informational or propositional *content,* Manson and O'Neill argued that they are better construed as obligations that bear on the speech acts and other epistemic actions by which information is acquired, used, and conveyed. Informational obligations apply to *communicative transactions*, and are distorted if they are seen as bearing solely or primarily upon their informational or propositional *content.*[772] This way, the arguments developed here follow the line taken in the previous paragraphs: FPIC is primarily about the way in which the dialogue and the communicative process is structured. This insight is crucial for successful informing and thereby for successful FPIC. The key argument is that when informed consent processes are undertaken, it is vital to not only focus on what type of information is to be provided, but just as much on how such information is conveyed. In other words, for successful *information*, and successful FPIC, it is essential that a wide range of norms that guide communicative transactions are taken into account.

Genuine *informed* consent cannot be achieved by communicative transactions that do not take into account norms of *intelligibility* and *relevance*; those norms are essential for effective communication. Moreover, norms of *accuracy* and *honesty* must also be met. Essential features of successful communication include that parties share a *language*, share at least some *background knowledge* and are able to take each other's *inferences* and *commitments* into account. This is to be guiding for successful application of the "informed" requirement.

Consent and Representation

Participation, including participation in FPIC processes, presupposes representation. International standard setting is meaningless unless there are intermediate structures that facilitate its implementation, and this is possible only if indigenous peoples are fairly represented. FPIC processes are devised to bridge this gap between standards and reality.

Both internal and external aspects of representation are vital to take into account for successful FPIC processes. Articles 18 and 19 of the UN Declaration, which set out the general framework for indigenous participation, highlight these aspects. Externally, it is important that it is a people "as a whole" that is represented, while internally the members should be able to participate in the collective will-formation.

Different forms of *isolation* complicate representation and obtaining FPIC. The most isolated communities may be extra vulnerable and it is especially in these communities that FPIC processes are most difficult to organize. At the

[772] Manson and O'Neill, 2007, pp. 188-189.

same time, social isolation of indigenous groups is the reason for developing effective participatory mechanisms, like FPIC.
Internally, FPIC processes have to make sure that the voices of *vulnerable groups* within the community – women and youths – are taken into account, while at the same time it is vital that these internal processes can be conducted in a manner compatible with the cultural structures of the group. Appropriate forms of self-government and participation rights may have the effect of promoting democratic values within communities.

Obtaining consent is a complex issue since cultures are internally negotiated, interacting, and overlapping and since it is important to take the multiple overlapping spheres of community, authority, and interdependency that exist in societies into account. But without taking these insights into account, FPIC becomes impossible to obtain. Perceiving FPIC as a single and centered moment of decision-making is undesirable because this may ignore the fact that there are a myriad of intra and inter group relations and circumstances that play an important role. Cultural identity is dynamic, and this ought to be reflected in FPIC processes.

These complexities related to "overlap" have the effect that FPIC processes and representation of cultural identities is highly complex, but this should not be seen as a definite obstacle. Acknowledging overlap and devising FPIC structures that take this into account can expose common ground between the parties involved and may lead to real cultural recognition.

Final Remarks

The scope of *consent* itself is dependent upon a number of factors, and as will be further investigated in the coming paragraphs, is dependent upon the impact of the proposed decision and the nature of the affected rights it is concerned with. FPIC may include the option of saying no to a certain project. As was argued in this part, FPIC is always important in overarching effective participation processes and it is always the goal of such processes. Therefore, the more fundamental questions is not if an FPIC right may block a certain decision, but how to structure the process so that it becomes a fair dialogue based on continuity and recognition of relationships between indigenous peoples and other actors.

FPIC is embedded in the framework of self-determination and the right to effective participation. It is indicated in contemporary international law and studies that effective participation and FPIC are important in realizing the implementation of the set standards. An intercultural dialogue is needed in which indigenous peoples enjoy a large degree of discursive control. When they are in a non-dominated position co-responsible decision-making will be possible. Fair representation and standards that guarantee successful communicative transactions are essential in any FPIC process. This part has surveyed the central principles that need to be taken into account in order to successfully conduct FPIC processes. The following paragraphs will explore, firstly, the international and regional platforms for FPIC norms and secondly, the

practical legal and quasi-legal implications of FPIC processes, bearing these principles in mind.

IV. PLATFORMS

Midway in this study, a short recapitulation of the structure and argumentation and a glance into what is still to come may be useful. In part II (Principles) the foundations of FPIC were explored, and it was argued that a consent principle is indeed fundamental to the claims indigenous peoples worldwide state, because it is an expression of indigenous self-determination and vital for securing control (to a certain extent) over lands and resources.

Part III explored the concepts of effective participation and FPIC from a number of theoretical perspectives and considered a number of guiding principles that these processes could adhere to. Reality unfortunately often shows a very different picture. The second half of this study will explore FPIC and its related concepts from a more practical perspective.

Part IV and V will answer three questions that are instructive for clarifying the two elements of the main research question: the current status of FPIC and baselines for its successful implementation. Firstly, where can we find FPIC requirements in international law and legal documents and which international institutions deal with it? Secondly, what is the legal status of FPIC considering a number of recent cases dealing with indigenous land and participation rights? Thirdly, how could FPIC be implemented in practice, taking the legal status into account?

To answer the first questions, Part IV will survey the existing international platforms and institutions in which FPIC norms are mentioned. At the end of this part, some special attention will be given to the UN system of indigenous peoples protection.

For the second question – regarding the legal status of FPIC – a number of landmark cases, mainly from the Inter-American Court of Human Rights, will be examined in part V. It will be argued that the Inter-American Court's system of property and participation rights offers the most comprehensive legal model on how to implement land and resource rights and FPIC processes.

The related third question will be answered by examining a number of recent FPIC implementation models that have been developed in the context of so-called "voluntary initiatives." These progressive and specific models all deal with sustainable use of resources and include detailed FPIC implementation schemes.

IV.1 The International Diffusion of FPIC standards

IV.1.1 Mapping and Tracing FPIC in International Law

This part will examine where the requirement of FPIC can be found in international law and policy documents. It will provide an overview of the relevant platforms and documents in which FPIC is elaborated upon, in order to

show that there is a widespread diffusion of FPIC requirements, especially in recent years.

IV.1.1.1 FPIC: Diffusion in International Law and Institutions

As mentioned, the participatory rights in the UNDRIP can be seen as expressions of the right to self-determination. The standard of FPIC is seen as the most far-reaching and important of the participatory rights in the Declaration and is becoming an important general principle for indigenous peoples.

As observed above, FPIC can be found in a number of provisions in the UNDRIP regarding relocation, cultural protection, land, and resources and environmental protection.[773] Article 19, perceived in light of Article 18, contains one of the broadest affirmations of self-government, participation, and the principle of FPIC:

> **Article 18**
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> **Article 19**
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[774]

The provisions expose particular areas in which FPIC should be made operational. They emphasize the fields in which indigenous rights are most often violated. Furthermore, FPIC is also applied in more fundamental provisions on the relation between Indigenous Peoples and the State. Article 18 and 19 contain a more general principle that consent has to be sought in all matters affecting indigenous peoples, emphasizing its political, external dimension in relation to the state.

The codification of free, prior and informed consent in Article 32, which addresses development activities affecting indigenous peoples' land and resource rights, is of paramount importance as well,[775] since indigenous peoples regard

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773 United Nations Declaration on the Rights of Indigenous Peoples, UN A/RES/61/295, Articles 10, 11, 28, 29 and 32.
774 Emphasis added.
775 E/C.19/2008/CRP.12, 18th of April, 2008, UNPFII 7th Session: "The UN Declaration on the Rights of Indigenous Peoples, Treaties and the Right to Free, Prior and Informed

their ability to survive, culturally and physically, as inextricably bound to occupying and controlling their territories and resources.[776] In this light Article 10, which prohibits relocation without the free, prior and informed consent of the group concerned, also emphasizes the invaluable connection that indigenous peoples have with their traditionally occupied lands.

Importantly, the UNDRIP is not the only instrument that mentions FPIC, nor is it the oldest. The following paragraphs will therefore explore in which other documents FPIC requirements are mentioned and explained.

IV.1.1.2 Traces of FPIC in International Law

Traces of a principle of Free, Prior and Informed Consent in relation to indigenous peoples' protection can be found in various international instruments and documents. The following section will provide a general overview of where these elements can be located and how they seek to protect indigenous peoples.

As early as 1975, the International Court of Justice emphasized that consent should be the basis for regulating the relations between indigenous peoples and states in its advisory opinion on the Western Sahara, in which the *terra nullius* doctrine was explicitly abandoned. The Court explained that exercising the right to self-determination requires the free expression of the will of the people – the indigenous people of the territory – involved.[777]

IV.1.1.3 The Cobo Study

A watershed in UN activities in relation to indigenous peoples' protection was caused by the 1971 ECOSOC resolution authorizing the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to study the "Problem of Discrimination against Indigenous Populations."[778] The resulting reports by Special Rapporteur José R. Martínez Cobo became a standard reference and created a platform for further research.[779] Cobo's conclusions produced a series of recommendations and findings that were generally supportive of indigenous peoples' demands.[780] Already in his final report of

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Consent: The Framework For a New Mechanism for Reparations, Restitution and Redress." page 7.

[776] Lâm M C, 'Remembering the Country of Their Birth: Indigenous Peoples and Territoriality', Journal of International Affairs, vol. 57, no. 2, Columbia University, New York, 2004, page 130.

[777] I.C.J. Advisory Opinion on Western Sahara (1975), paragraph 62.

[778] Anaya, 2004, page 62.

[779] The original documents published from 1981 to 1983 are: U.N. Docs. E/CN.4/Sub.2/476/Adds.1-6 (1981), E/CN.4/Sub.2/1982/2/Adds.107 (1982) and E/CN.4/Sub.2./1983/21/Adds.1-7 (1983).

[780] S Anaya, 2004, page 62.

1983,[781] Cobo stressed the importance of a "consent" principle governing indigenous peoples' land rights. In relation to partition of land, the report mentioned:

> In any case, the community has a continuing interest and no alienation should occur without **the informed and verified authorisation** of the community made through the appropriate traditional procedures [...][782]

In different words carrying the same message, Cobo concluded that:

> The principle of unrestricted ownership and control of land, including all natural resources, by indigenous peoples should be recognized. The lands, land rights and natural resources of indigenous peoples should not be taken, and these rights should not be terminated or extinguished unilaterally or without the **full and informed consent** of the indigenous peoples concerned.[783]

Martínez Cobo's findings guided, and continue to guide, international views on indigenous peoples' protection.

IV.1.1.4 The International Labour Organisation

ILO Convention No. 169 of 1989, mentioned earlier is widely regarded as the most important legally binding instrument dealing specifically with indigenous peoples' protection, especially in Latin America.[784] In ILO Convention 169 a requirement of consent is codified in Article 16, regarding relocation of indigenous.[785] Articles 6, 7, and 15 of the Convention provide the general legal framework regarding the consultation and participation of indigenous peoples.[786]

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781 José Martínez Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations,* E/CN.4/Sub.2/1983/21/Add.8.

782 José Martínez Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8, page 69, at 529. Emphasis added.

783 José Martínez Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8, page 70, at 540. Emphasis added.

784 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entry into force 5 September 1991.

785 Article 16(2) ILO 196 reads: "Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent."

786 A/HRC/15/35, General Assembly Distr.: General, 23 August 2010, Human Rights Council, Fifteenth session, Item 5, Human rights bodies and mechanisms, Progress report on

In Article 6(2) the requirement is found that, as a general principle, "the consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." This way, the provision creates a general requirement applicable to all consultation rights in the Convention. Such consultation rights can be found in Articles 2, 15, and 33, where the Convention includes a mandate for states to fully consult with indigenous peoples and to ensure their informed participation.

Furthermore, Article 4(2) includes the requirement that special measures for the protection of indigenous peoples shall not be "contrary to the freely-expressed wishes of the peoples concerned." ILO 169 thus includes a requirement of consent, but it is only an explicit requirement in relation to relocation of indigenous peoples. Nevertheless ILO 169 is based on recognition of the intrinsic worth of cultural diversity and principles of consultation and participation. It proved to be an important source of inspiration for many of the provisions in the UNDRIP.

IV.1.1.5 The Human Rights Committee on Consent

In addition to the statements on effective participation and positive obligations of the state under article 27 of the ICCPR, the Human Rights Committee elaborated on a consent requirement in the 2009 Poma case.[787] The Committee held that in case of measures which substantially interfere with culturally significant activities of a minority or indigenous community the admissibility of such measures is to be determined by the degree and opportunity the members of the community had to effectively participate in the decision-making process. Most importantly, the Committee stated that mere consultation is not sufficient, but that the free, prior and informed consent of the community is necessary. Furthermore, the principle of proportionality should be taken into account.[788] The Human Rights Committee has referred to FPIC requirements on several occasions.[789]

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the study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, paragraph 18.

[787] *General Comment No. 23: The rights of minorities (Art. 27), 04/08/1994,* CCPR/C/21/Rev.1/Add.5, General Comment No. 23. Poma Poma v.Peru, Comm. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (HRC 2009).

[788] HRC, Poma Poma v.Peru, Comm. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (2009), p. 11, para. 7.6.

[789] Also see e.g.: Canada, CCPR/C/CAN/CO/5, 20 April 2006, para. 22: "It is concerned that the discriminatory effects of the Indian Act against Aboriginal women and their children in matters of reserve membership have still not been remedied, and that the issue of matrimonial real property on reserve lands has still not been properly addressed. While stressing the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them" Panama, CCPR/C/PAN/CO/3, 17 April 2008, para. 21: "The absence of a process of consultation to seek the prior, free and informed consent of communities to the exploitation of natural resources in their territories; the ill-

IV.1.1.6 The Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD) – the body of independent experts that monitors the implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its member states – referred to the principle in its general recommendation XXIII of 1997.[790] Paragraph 4(d) calls upon states parties to: "Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no *decisions relating to their rights and interests* are taken *without their informed consent*."[791] The Committee thus presented a more general requirement than the regime in Articles 18 and 19 of the UN Declaration. Where Article 19 refers only to legislative and administrative measures that may affect indigenous peoples, paragraph 4(d) covers a wider area and broadens the scope to all decisions relating to their rights and interest.

The Committee referred to FPIC on several moments in its concluding observations. For instance, in 2001 the Committee expressed its concern about land rights of indigenous peoples in the United States and called upon the state to:

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treatment, threats and harassment to which members of the communities have reportedly been subjected on the occasion of protests against hydroelectric infrastructure construction projects, mining operations or tourism facilities on their territory; and the non-recognition of the special status of indigenous communities that are not within a comarca (articles 1, 26 and 27 of the Covenant). Nicaragua, CCPR/C/NIC/CO/3, 12 December 2008, para. 21: "The Committee voices concern regarding the existence among the general public of racial prejudice against indigenous peoples, especially in the Autonomous Regions of the Atlantic coast, and the many problems affecting indigenous peoples, including serious shortcomings in health and education services, the fact that institutions have few or no branches in their areas, and the absence of a consultation process to secure free, informed prior consent to the exploitation of natural resources on indigenous communities' lands." Colombia, CCPR/C/COL/CO/6, 4 August 2010: "The Committee also regrets that no progress has been made on the adoption of legislation to criminalize racial discrimination or on the adoption of legislation for holding prior consultations and guaranteeing the free, prior and informed consent of the members of the relevant community (arts. 2, 26 and 27)." El Salvador, CCPR/C/SLV/CO/6, 27 October 2010: "The State party must promote the full recognition of all the indigenous peoples and consider ratifying ILO Convention No. 169 on Indigenous and Tribal Peoples. With the free, prior and informed consent of indigenous peoples and through prior consultation, the State party should include questions in the next census that allow the identification of such peoples, design and implement public policies to effectively achieve their rights, and take special measures to overcome the marginalization that they have experienced." Togo, CCPR/C/TGO/CO/4, 11 March 2011, at para. 21: "The Committee observed "with concern that neither the existence of indigenous peoples in Togo nor their right to free, prior and informed consent is recognized (arts. 2 and 27)," and recommended that the State party should "ensure that indigenous peoples are able to exercise their right to free, prior and informed consent."

[790] CERD, General Recommendation 23: Indigenous Peoples, 18th August 1997, Fifty-first session.

[791] Italics added.

> ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5 (c) of the Convention, and draws the attention of the state party to general recommendation XXIII on indigenous peoples, which stresses the importance of securing the 'informed consent' of indigenous communities.[792]

In its 2006 landmark concluding observations concerning Canada, the Committee recommended that the state should "explore ways to hold transnational corporations accountable."[793] The statement marked the first time that a UN Treaty Monitoring Body declared a state responsible to monitor the activities of corporations regarding compliance with international human rights. This way the Committee emphasized the obligations of the state in relation to indigenous peoples and the international community.[794]

Recently, the Committee addressed the United States in its Concluding Observations Considering Reports Submitted by State Parties under Article 9 of the Convention.[795] The recommendations by the Committee underline the rights of indigenous peoples to FPIC and to participate in decisions affecting them.[796] Furthermore, the Committee recommends that the UN Declaration on

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[792] Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, 14th August 2001, A/56/18,paras.380-407, CERD/C/59/Misc.17 /Rev.3, 2001.

[793] CERD/C/CAN/CO/18, Paragraph 17, Committee on the Elimination of Racial Discrimination, Seventy-second session, Consideration of Reports Submitted by State Parties Under Article 9 of the Convention, Concluding Observations, Canada, May 2007

[794] E/C.19/2008/CRP.12, United Nations Permanent Forum on Indigenous Issues, Seventh session, 18 April, 2008, page 19.

[795] CERD/C/USA/CO/6, Committee on the Elimination of Racial Discrimination, Seventy-second session, Consideration of Reports Submitted by State Parties Under Article 9 of the Convention, Concluding Observations, United States of America, Advance Unedited Version, February 2008.

[796] Also see e.g.: Argentina: CERD/C/65/CO/1, August 2004, par. 18: "The Committee takes note that the Co-ordinating Council of Argentine Indigenous Peoples envisaged by Act No. 23,302 to represent indigenous peoples in the National Institute of Indigenous Affairs, has still not been established. The Committee recalls its General Recommendation 23 on the rights of indigenous peoples which calls upon State parties to ensure that no decisions directly relating to their rights and interests are taken without their informed consent and urges the State party to ensure that the Council is established as soon as possible and that sufficient funds are allocated for the effective functioning of the Council and the Institute." Bolivia: 10/12/2003. CERD/C/63/CO/2, par. 13: "In this regard, the Committee draws the attention of the State party to its general recommendation XXIII which, inter alia, calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories." Ecuador: 21/03/2003. CERD/C/62/CO/2, par. 16: The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured." Laos, CERD/C/LAO/CO/15,

the Rights of Indigenous Peoples should be used as a guide to interpret the State Party's obligations under the legally binding Convention. In the paragraphs on the Saramaka case, more recent reports of the CERD will be examined.

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18 April 2005, para. 18: "It recommends to the State party that it study all possible alternatives with a view to avoiding displacement; that it ensure that the persons concerned are made fully aware of the reasons for and modalities of their displacement and of the measures taken for compensation and resettlement; that it endeavour to obtain the free and informed consent of the persons and groups concerned; and that it make remedies available to them." India: CERD/C/IND/CO/19, 5 May 2007, para. 19: "The State party should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities." Ecuador: CERD/C/ECU/CO/19, 15 August 2008, para. 16: "The Committee urges the State party to enforce the Consultation and Participation Act fully in practice and that in light of its General Recommendation 23, section 4(d), consult the indigenous population concerned at each stage of the process and obtain their consent in advance of the implementation of projects for the extraction of natural resources." Colombia: CERD/C/COL/CO/14, 28 August 2009: " The Committee, while noting efforts of the State party to conduct consultations with affected communities, is nevertheless concerned that the right to prior consultations and consent is frequently violated in conjunction with megaprojects relating to infrastructure and natural resource exploitation, such as mining, oil exploration or monocultivation. The Committee recommends that the State party adopt and implement in a concerted manner legislation which regulates the rights to prior consultation in accordance with ILO Convention No. 169 and relevant recommendations of the CEACR of the ILO, in order to ensure that all prior consultations are undertaken in a manner which respects the free and informed consent of the affected communities. The Committee recommends that the State party seek technical advice from the OHCHR and the ILO for this purpose." Cameroon, CERD/ C/CMR/CO/15-18, 30 March 2010: "The Committee recommends that the State party take urgent and adequate measures to protect and strengthen the rights of indigenous peoples to land. In particular, bearing in mind general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee recommends that the State party: (a) Establish in domestic legislation the right of indigenous peoples to own, use, develop and control their lands, territories and resources; (b) Consult the indigenous people concerned and cooperate with them through their own representative institutions, in order to obtain their free and informed consent, before approving any project that affects their lands, territories or other resources, in particular with regard to the development, use or exploitation of mineral, water or other resources." Guatemala, CERD/C/GTM/CO/12-13, 19 May 2010, para. 11: "The Committee reiterates its concern at the fact that the State party continues to allow indigenous peoples to be dispossessed of land that has historically belonged to them, even though title to the property in question has been duly recorded in the appropriate public registries, and that indigenous peoples' right to be consulted prior to the exploitation of natural resources located in their territories is not fully respected in practice. The Committee is also concerned that the traditional form of land tenure and ownership is not recognized under the State party's domestic laws and that the State party has not adopted the necessary administrative measures to guarantee this form of tenure (art. 5 (d) (v))." Panama, CERD//C/PAN/CO/15-20, 19 May 2010: "The Committee expresses its serious concern at the lack of effective mechanisms for consultation with the indigenous peoples, and highlights in particular the need to obtain prior, informed and voluntary consent for development projects, resource exploitation and tourism affecting their way of life."

IV.1.1.7 The Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR), established under ECOSOC Resolution 1985/17 of 28 May 1985, mandated with monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[797] has referred to a requirement of consent on behalf of indigenous peoples on several occasions.

In 2004, the Committee expressed concern for Indigenous land and resource rights in Ecuador, stating that: "The Committee is deeply concerned that natural extracting concessions have been granted to international companies *without the full consent* of the concerned communities."[798] The Committee was also concerned about the negative health and environmental impacts of natural resource extracting companies' activities "at the expense of the exercise of land and culture rights of the affected indigenous communities and the equilibrium of the ecosystem."[799]

In 2001, the Committee already noted in relation to Colombia that: "the traditional lands of indigenous peoples have been reduced or occupied, *without their consent,* by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem."[800] In paragraph 33, the Committee subsequently emphasized the requirement of priority, and urged Colombia to: "consult and seek the *consent* of the indigenous peoples *prior to the implementation* of timber, soil or mining projects *and on any public policy affecting them,* in accordance with ILO Convention No. 169."[801] The Committee reaffirmed the ILO's vision on FPIC and even used stronger words to describe the need for indigenous peoples to give their consent in matters affecting them. In later concluding observations, the Committee explicitly referred to FPIC on numerous occasions.[802]

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797 The Committee carries out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant. Unlike the Human Rights Council, The Committee is not competent to consider individual complaints, although a draft Optional Protocol to the Covenant is currently under consideration which could give the Committee competence in this regard.

798 Italics added.

799 Concluding observations of the Committee on Economic, Social and Cultural Rights: Ecuador. 07/06/2004, E/C.12/1/Add.100, paragraph 12.

800 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia. 30/11/2001, E/C.12/1/Add.74, paragraph 12. Italics added.

801 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia. 30/11/2001, E/C.12/1/Add.74, paragraph 33. Italics added.

802 See e.g.: Mexico, Future E/C.12/CO/MEX/4, 17 May 2006, para. 28: "The Committee urges the State party to ensure that the indigenous and local communities affected by the La Parota Hydroelectric Dam Project or other large-scale projects on the lands and territories which they own or traditionally occupy or use are duly consulted, and that their prior informed consent is sought, in any decision-making processes related to these projects affecting their rights and interests under the Covenant, in line with ILO Convention No. 169 on Indigenous and Tribal Peoples." Philippines, E/C.12/PHL/CO/4, 1 December 2008, para. 6: "The Committee also notes with satisfaction the various legislative, administrative and policy

IV.1.1.8 Responsibilities of Transnational Corporations

The 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,[803] approved by the Sub-Commission on the Promotion and Protection of Human Rights at its Fifty-fifth session, explicitly mention the principle of free, prior and informed consent for indigenous peoples and reaffirm the viewpoints of ILO Convention 169 in the accompanying legal commentary. Paragraph 10(c) obliges transnational corporations (TNCs) and other business enterprises to respect:

> The principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects. Indigenous peoples and communities shall not be deprived of their own means of subsistence, nor shall they be removed from lands which they occupy in a manner inconsistent with Convention No. 169.[804]

The former UN Centre for Transnational Corporations affirms this in a series of reports that examine the activities of multinational corporations in areas with indigenous populations.[805] It was concluded in the 1994 closing report that: "TNCs' performance was chiefly determined by the quantity and quality of *indigenous peoples' participation in decision-making*, rather than by the identity or nationality of the TNCs." Participation depended, in turn, on the extent to which the laws of the host country gave indigenous peoples *the right to withhold consent* to development, and on the degree to which indigenous communities

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measures adopted by the State party to recognize, protect and promote the individual and collective rights of the indigenous peoples living in the territory of the State party, including ... (b) The Free and Prior Informed Consent Guidelines, adopted by the National Commission on Indigenous Peoples in 2002, which emphasise the right of indigenous peoples to participate in decisions affecting them." Nicaragua, E/C.12/NIC/CO/4, 28 November 2008, para. 11:." The Committee also regrets the many problems affecting indigenous peoples, including serious shortcomings in the health and education services; and the lack of an institutional presence in their territories; and the absence of a consultation process to seek communities' free, prior and informed consent to the exploitation of natural resources in their territories. In this regard, the Committee notes that, more than six years after the Inter-American Court's judgement in the Awas Tingni case, that community still does not have title to its property." Colombia, E/C.12/COL/CO/5, 21 May 2010: " The Committee is concerned that infrastructure, development and mining megaprojects are being carried out in the State party without the free, prior and informed consent of the affected indigenous and afro-colombian communities."

803 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights E/CN.4/Sub.2/2003/38/Rev.2.

804 Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights E/CN.4/Sub.2/2003/38/Rev.2, Paragraph 10 (c).

805 Motoc I A,'Standard Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent', UNPFII, 2005, E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005.

themselves were *fully informed and effectively organised*."[806] The report thus leaves a certain discretionary power for the state to determine the scope of indigenous participation. Nevertheless, the report does not rule out the option that national legislation could, or should, entail the option of withholding consent in relation to TNCs and other enterprises' activities.[807]

IV.1.1.9 The Rotterdam Convention

Although not directly related to indigenous peoples, the Rotterdam Convention on the Prior Informed Consent Procedure for certain Hazardous Chemicals and Pesticides in International Trade[808] deserves a short reference.[809] The Convention applies to banned or severely restricted chemicals and hazardous pesticides that may affect the environment and public health.[810] The significance of the Convention lies in its legally binding Prior Informed Consent procedure (PIC), which is aimed at obtaining and disseminating decisions of importing countries as well as ensuring compliance by the exporting countries. The Rotterdam system offers an example of an operational formal consent procedure.[811] FPIC in relation to the storage of hazardous substances is reflected in Article 29 of the UNDRIP.

IV.1.1.10 The Policy of the European Union

In December 2005, the European Council, Parliament and Commission adopted a Joint Statement on Development Policy called the "European

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[806] Report of the Centre on Transnational Corporations submitted pursuant to Sub-Commission resolution 1990/26, E/CN.4/Sub.2/1994/40, 15 June 1994, paragraph 20, italics are mine.

[807] Noteworthy and highly relevant for the human rights responsibilities of companies are the 2011 "Ruggie Principles" that will be dealt with briefly in Part IV: A/HRC/17/31, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011.

[808] Rotterdam Convention on the Prior Informed Consent Procedure for certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 10 September 1998, entry into force: 24 February 2004.

[809] Article 29(2) of the U.N. Declaration on the Rights of Indigenous Peoples has a similar aim. It reads: "States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their *free, prior and informed consent*." Italics are mine.

[810] PFII/2004/WS.2/8, Parshuram Tamang, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, contribution to the Workshop on Free, Prior and Informed Consent, New York, 17-19 January 2005, page 4.

[811] For the PIC procedure, see the text of the Convention, http://www.pic.int/en/ConventionText/ONU-GB.pdf, in particular Articles 5 – 14 and Annex I, II, IV, V and VI.

Consensus on Development" committing the EU to "apply a strengthened approach to mainstreaming the following cross-cutting issues: the promotion of human rights, gender equality, democracy, good governance, children's rights and indigenous peoples, environmental sustainability, and combating HIV/AIDS."

These cross-cutting issues are seen as objectives in themselves and vital factors in strengthening the impact and sustainability of cooperation. According to the Statement, the key principle for indigenous peoples is "to ensure their full participation and the free and prior informed consent of the communities concerned."[812]

Moreover, indigenous peoples' issues are a priority under the European Instrument for Development and Human Rights (EIDHR), which is aimed at providing support for the promotion of democracy and human rights in non-EU countries.[813] The instrument provides a number of opportunities for specific action in the field of indigenous peoples protection. Projects that have been funded so far are aimed at supporting indigenous peoples and their representatives, international organizations, and at supporting civil society activities for promoting ILO Convention No. 169.[814]

IV.1.1.11 The OAS Human Rights System

The Inter-American Court and Commission are deeply involved in developing and explaining the notion of free, prior and informed consent and their judgments and decisions will therefore be examined in detail later on. A short introduction is provided here.

As early as 1984, the Commission held that the "principle of consent" was the preponderant doctrine applicable to cases involving relocation of indigenous peoples.[815] More recently, in a series of decisions concerning indigenous land rights,[816] the Court and Commission emphasized the connection between a

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812 Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', (2006/C 46/01), The European Consensus on Development, para. 100, 101, 103.

813 See: European Commission website at:
http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm, consulted April 2014.

814See:
http://www.un.org/esa/socdev/unpfii/documents/UNPFII%20European%20Commission%20submission.pdf, consulted April 2014.

815 Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito origin, OEA/Ser.L/V/II.62, doc.26. (1984), 120.

816 Final decisions of the Commission are presented in the form of a Report, which includes the facts and conclusions of the Commission. If the case is not brought before the Court and no adequate measures have been taken by the responding State, the Commission may decide to publish the Report. The Commissions Reports are not formally legally binding, in contrast to the final decisions of the Court, which are presented as binding judgments, adopted by a majority of the seven judges.

collective property right to traditional lands, and a requirement of consent for intrusions thereon. In the ground breaking Awas-Tingni case,[817] the Court developed its reasoning on communal or collective property rights of indigenous peoples over their lands and resources, in asserting a violation of human rights standards. In the Dann Report,[818] the concept of "consent" was explained as denoting "consent on the part of the community as a whole" that requires at a minimum "the effective opportunity of every member to participate individually or as collectives." These criteria again illustrate the two dimensions in which FPIC operates; internally within the indigenous collective itself, and externally between the indigenous collective entity (by means of representation) and the state (or any other agent charged with obtaining consent).[819]

In the Belize Report,[820] the communal property rights "doctrine" and the Dann criteria for consent were reaffirmed, and it was acknowledged that the interrelated concepts of property rights and self-determination are the foundations of the concept of FPIC. The most important and recent decision of the Court, dealing explicitly with FPIC and the UN Declaration, is the Saramaka People v. Suriname case.[821] The Court determined that it is an obligation for the state to ensure the cultural survival of the Saramaka people, expanded its earlier doctrine and explicitly referred to the principle of free, prior and informed consent as enshrined in the UNDRIP. A set of safeguards for the implementation of an FPIC procedure was developed (requirements of effective participation, benefit-sharing, and prior environmental and social impact assessments), and the Court confirmed that "consultation" and "consent" are clearly different concepts, which nevertheless remain in need of further clarification.[822] At least in relation to large-scale development projects that have a major impact on indigenous territories, effective participation requires – in addition to consultation – the free, prior and informed consent of the people(s) affected. A core criterion for such a process is that FPIC should be obtained in accordance with indigenous custom, practice and tradition.

The Inter-American Human Rights and the cases and decisions of the Court and Commission will be explored in further detail later on in this study, since

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817 IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79.

818 IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002.

819 Recall the model that was sketched in the paragraphs on self-determination.

820 IACHR, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R. (2004), October 12 2004..

821 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007).

822 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 133. Also see: African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010.

these form the most complete elaboration on participation rights and rights to lands and resources.

IV.1.1.12 The Draft American Declaration on the Rights of Indigenous Peoples

The Proposed American Declaration on the Rights of Indigenous Peoples is an important document in the context of the OAS.[823] Like the UNDRIP the draft outlines those human rights that are specific to indigenous peoples. One of the major differences between the Draft American Declaration and the UN Declaration is that the former does not grant the right to self-determination to indigenous peoples. In Article I(c) it is stated that the term "peoples" as used in the American Draft "shall not be construed as having any implication with respect to any other rights that might be attached to that term in international law." Nevertheless, although any right to self-determination is not awarded, the opening words of Article XV(1) defining the right to self-government are very similar to the general formulation of the right to self-determination:[824]

> Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development.

Article XIII(7) contains the requirement of informed consent on behalf of the indigenous people concerned with regard to natural resource development projects. However, the requirement is only applicable in cases where the State has declared an indigenous territory as protected area. With regard to property rights and exclusive indigenous title, it is stated in Article XVIII(3) that indigenous property title may only be changed by mutual consent between the state and the indigenous peoples concerned. An additional requirement of "full knowledge and appreciation of the nature of or attributes of such property" appears to entail the condition that such consent has to be "informed."

Paragraph 6 of the same Article XVIII poses the prerequisite of "free, genuine, public and informed consent" in relation to relocation or transfer of indigenous peoples from their lands. Nevertheless, this condition can be abandoned in exceptional and justified circumstances as to warrant the public interest. In relation to indigenous peoples' right to development, Article XXI(2) includes the obligation for states to acquire indigenous peoples' free and informed consent and participation regarding any plan, program, or proposal affecting their rights or living conditions. Once again the requirement can be disregarded in the case of "exceptional circumstances."

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823 Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session, OEA/Ser/L/V/.II.95 Doc.6 (1997).

824 This resemblance will only be noticed. A comparative examination of the concepts of self-government and (internal) self-determination for Indigenous Peoples unfortunately falls outside the scope of this study.

Although the principle of FPIC appears to be inextricably linked to the right to self-determination in the UN Declaration on the Rights of Indigenous Peoples,[825] the Proposed American Declaration does not explicitly refer to self-determination, but rather to self-government. However, it does contain provisions entailing consent requirements for specific areas of indigenous peoples' protection. The difference between self-determination and the self-government norm expressed in the American Draft Declaration is unclear.

IV.1.1.13 The African Commission on Human and Peoples' Rights

The first time indigenous peoples' representatives participated in a session of the African Commission was at the 29th session in Libya on April 2001. Since then, indigenous people have been participating actively in the sessions of the Commission, speaking in public sessions, lobbying their governments, and networking with human rights NGOs across Africa. Their input has been important for the promotion the protection of their rights, and several indigenous organizations have attained observer status with the African Commission. Moreover, they participate in the NGO Forum organized by The African Centre for Democracy and Human Rights Studies prior to each of the sessions of the African Commission.[826]

In the Endorois decision,[827] the Commission noted that Kenya had not obtained the free, prior and informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction. The Commission repeatedly referred to the jurisprudence of the Inter-American Court of Human Rights in its decision. The Saramaka People v. Suriname judgment was quoted extensively in the Commission's argument. The Commission was of the opinion that in case of: "Any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[828] The Endorois decision will be discussed at length later on.

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[825] For the connection between Self-Determination and the participatory provisions in the Declaration, FPIC in particular, See conclusions Part II.

[826] *International Work Group for Indigenous Affairs (IWGIA),* Indigenous Peoples' Participation in the ACHPR Sessions, *www.iwgia.org/sw8772.asp, last visited 6th of June, 2009.*

[827] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010..

[828] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, para. 291.

IV.1.1.14 The World Bank System and the Extractive Industries Review

In 2003, the Extractive Industries Review (EIR) called upon the World Bank Group to respect the principle of free, prior and informed *consent*, with regard to extractive industries affecting indigenous peoples. [829] The final report stated that free, prior and informed consent should be seen as the "principal determinant of whether there is a social license to operate."[830] According to the EIR, FPIC counts as an important tool in establishing support for extractive industry related activities. Nevertheless, the EIR also recognized that there are real issues that need to be resolved in order to make the instrument of FPIC more effective and clear.[831] This clarification of the principle, according to the EIR, should be worked out in cooperation with international expert bodies.[832] did not appear to regard FPIC as entailing a collective veto-right *per se*. Instead, FPIC should be seen as a process, "by which indigenous peoples, local communities, government, and companies may come to mutual agreements in a forum that gives affected communities enough leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off."[833] While recognizing that this consent-process should take different forms in different cultural settings, the EIR regards FPIC as always applicable in order to achieve inclusion of indigenous peoples in the decision-making processes.[834]

In spite of the EIR recommendations, the World Bank does not require consent in relation to its policy on indigenous peoples. Nevertheless, in its new Operational Policy and Bank Procedures on Indigenous Peoples,[835] the World Bank requires free, prior and informed c*onsultation* where indigenous peoples are affected. Paragraph 10 of OP 4.10 reads:

> (10.) Consultation and Participation. Where the project affects Indigenous Peoples, the borrower engages in free, prior, and informed consultation with them. To ensure such consultation, the

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829 Striking a Better Balance, The World Bank Group and Extractive Industries. Final Report of the Extractive Industries Review, Vol. I, December 2003.
830 *Ibid.,* page 21.
831 *Ibid.,* page 21.
832 *Ibid.,* page 21.
833 *Ibid.,* page 50.
834 In this context see also: E/CN.4/Sub.2/AC.4/2002/3, Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, held in Geneva on 5-7 December 2001 in which the workshop recommendations stated that: "Consultation between Indigenous Peoples and the private sector should be guided by the principle of free, prior, informed consent of all parties concerned." The wording "of all parties concerned" could indicate that FPIC should not be seen as a collective VETO-right for Indigenous Peoples, but more as a principle guiding effective participation and consultation processes.
835 OP and BP 4.10 together replace OD 4.20, *Indigenous Peoples*, dated September 1991. These OP and BP apply to all investment projects for which a Project Concept Review takes place on or after July 1, 2005.

> borrower:
> (a) establishes an appropriate gender and intergenerationally inclusive framework that provides opportunities for consultation at each stage of project preparation and implementation among the borrower, the affected Indigenous Peoples' communities, the Indigenous Peoples Organizations (IPOs) if any, and other local civil society organizations (CSOs) identified by the affected Indigenous Peoples' communities;
> (b) uses consultation methods appropriate to the social and cultural values of the affected Indigenous Peoples' communities and their local conditions and, in designing these methods, gives special attention to the concerns of Indigenous women, youth, and children and their access to development opportunities and benefits; and
> (c) provides the affected indigenous peoples' communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation. [836]

The Operational Policy does not recognize any consent requirement; thereby it seems to establish a different, weaker definition of FPIC, imposing no more than the obligation to consult indigenous peoples. Nevertheless, the Operational Policy requirement of free, prior and informed consultation is applicable at each stage of project preparation and implementation and in all situations where the project affects indigenous peoples. Furthermore, broad support from the indigenous community affected is required and the Bank does not proceed further with project processing if it is unable to ascertain that such support exists.[837]

Paragraph 2 of BP 4.10 further clarifies the Bank's principle of free, prior and informed consultation:

> (2.) Free, Prior, and Informed Consultation. When a project affects Indigenous Peoples, the TT assists the borrower in carrying out free, prior, and informed consultation with affected communities about the proposed project throughout the project cycle, taking into consideration the following:
>
> (a) "free, prior and informed consultation" is consultation that occurs freely and voluntarily, without any external manipulation,

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[836] World Bank Operational Manual, Operational Policies, OP 4.10, July 2005, Indigenous Peoples.
[837] World Bank Operational Manual, Operational Policies, OP 4.10, July 2005, Indigenous Peoples, Paragraph 6, 10 and 11. Not proceeding without affirmation of support appears to entail some consensual elements.

> interference, or coercion, for which the parties consulted have prior access to information on the intent and scope of the proposed project in a culturally appropriate manner, form, and language;
> (b) consultation approaches recognize existing Indigenous Peoples Organizations (IPOs), including councils of elders, headmen, and tribal leaders, and pay special attention to women, youth, and the elderly;
> (c) the consultation process starts early, since decision making among Indigenous Peoples may be an iterative process, and there is a need for adequate lead time to fully understand and incorporate concerns and recommendations of Indigenous Peoples into the project design; and
> (d) a record of the consultation process is maintained as part of the project files.[838]

Paragraph 2(a) thus provides an elaboration on the principle where "free" refers to a process of consultation that takes place voluntary, without any *external* manipulation, interference, or coercion. The Bank's policy is aimed at protecting indigenous communities from outside interference and emphasized that the structural framework for consultation is to be found within the indigenous traditional systems.

It seems that the World Bank did not consider the "consent" principle sufficiently clarified, or believed it was too strong, to enshrine it in its Operational Policy and Bank Procedure 4.10. Consultation appeared to be a safer route for indigenous participation in World Bank projects.[839] Where the EIR acknowledges the need for FPIC as entailing "consent," for the World Bank it subsequently appears to fail in clarifying this principle to an extend that it could function as a general effective instrument applicable in extractive industry activities affecting indigenous peoples. The principle is seen as guiding extractive industries and other private enterprise activities affecting indigenous peoples although its exact meaning still has to be determined. According to the EIR report, such clarification should be conducted in conjunction with expert organs on indigenous issues like the UNPFII.[840]

IV.1.1.15 The International Finance Corporation: Performance Standard 7

In its latest version of the Policy and Performance standards for indigenous peoples, the International Finance Corporation, part of the World Bank Group, refers to a number of activities that require FPIC. If the proposed activities (a)

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838 World Bank Operational Manual, Bank Procedures, BP. 4.10, July 2005, Indigenous Peoples.
839 E/C.19/2008/CRP.12, 18th of April, 2008, UNPFII 7th Session: According to the Indigenous Peoples understanding of FPIC, consent is clearly distinct from consultation.
840 Striking a Better Balance, The World Bank Group and Extractive Industries, Final Report of the Extractive Industries Review, Vol. I, December 2003, page 50.

are to be located on or make commercial use of natural resources on lands subject to traditional ownership or under customary use by indigenous peoples; (b) require their relocation; or (c) have a possible impact on the cultural resources that are central to indigenous peoples' identity, obtaining FPIC is a necessary requirement.[841]

The IFC standards go further than the World Bank Policy, by requiring consent instead of consultation. FPIC processes are seen as expanding consultation and participation processes as they require agreement by the culturally appropriate decision-making body within the affected community of indigenous peoples. According to the new standard, consent does not necessarily require unanimity and may be achieved when individuals or sub-groups explicitly disagree.[842]

If companies do not respect FPIC, the IFC will not finance the project. However, the standard is not entirely clear on what the requirement exactly entails. Nevertheless, companies are using the Performance Standard as an important reference.

IV.1.1.16 The Convention on Biological Diversity

The Convention on Biological Diversity recognizes the importance of securing agreement or consent of indigenous peoples in relation to access to genetic resources (Article 15) and traditional knowledge.[843] According to Article 8(j) each contracting party has to respect, preserve, and maintain knowledge, innovation, and practices of indigenous and local communities. Furthermore the parties should promote wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from their utilization.[844] FPIC is seen as an essential guarantee in this respect.[845] In paragraph V.2.1 the CBD's "Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities" will be discussed at length, since these guidelines entail a detailed model for conducting integrated impact assessments, which, as we shall see, are important elements of FPIC processes.

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841 International Finance Corporation, World Bank Group, *Performance Standard 7, Indigenous Peoples*, 1 January 2012.

842 International Finance Corporation, World Bank Group, *Performance Standard 7, Indigenous Peoples*, 1 January 2012.

843 *Convention on Biological Diversity,* Concluded in Rio de Janeiro, 5 June 1992.

844 *Convention on Biological Diversity,* Concluded in Rio de Janeiro, 5 June 1992, Article 8(j). The text does mention that this provision is "subject to national legislation."

845 Perrault A and Oliva M J, 'ICTSD/CIEL/IDDRI/IUCN/QUNO Dialogue on Disclosure Requirements: Incorporating the CBD Principles in the TRIPS Agreement On the Road to Hong Kong', WTO Public Symposium, Geneva, April 21 2005.

IV.1.2 A Closer Look at the United Nations System of Indigenous Peoples' Protection

Within the UN system, three mechanisms – that were already mentioned – are mandated to work specifically on indigenous peoples' issues. These are: the UN Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples. The following paragraphs will briefly explain their characteristics and functioning.

IV.1.2.1 The Permanent Forum on Indigenous Issues

The United Nations Permanent Forum on Indigenous Issues (UNPFII) is an advisory body to the Economic and Social Council (ECOSOC), mandated to discuss a broad range of indigenous issues related to culture, environment, economic and social development, education, and human rights.[846]

Indigenous peoples and other experts involved in the Working Group on Indigenous Populations (WGIP) determined that there was a need for stronger and more effective indigenous participation in the United Nations system. For this reason, indigenous peoples and others proposed the establishment of a new body that would address global issues related to indigenous peoples and would facilitate a platform for genuine indigenous participation.[847]

ECOSOC resolution 2000/22 provided the mandate and established the Permanent Forum on July 28, 2000.[848] According to paragraph 2 of the resolution, the Permanent Forum, in dealing with its mandated areas, shall:

(a) Provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council.
(b) Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system.
(c) Prepare and disseminate information on indigenous issues.[849]

The UNPFII is comprised of sixteen independent experts of whom eight are government representatives and eight are representatives of indigenous organizations. They each serve a three-year term and may be reappointed for an additional period. The Forum holds annual two-week sessions at the UN

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[846] UNPFII Website, http://www.un.org/esa/socdev/unpfii/. Consulted 10th January 2009.
[847] UNPFII Website, http://www.un.org/esa/socdev/unpfii/en/about_us.html, consulted 27th June 2008.
[848] Economic and Social Council Resolution 2000/22, Establishment of a Permanent Forum on Indigenous Issues, 45th plenary meeting, 28 July 2000.
[849] Economic and Social Council Resolution 2000/22, Establishment of a Permanent Forum on Indigenous Issues, 45th plenary meeting, 28 July 2000, Paragraph 2.

headquarters in New York, however, other locations for the sessions may be appointed by the Forum.

The Forum is the only place in the international arena where indigenous peoples are represented permanently and it facilitates their main international participatory process. The Permanent Forum is to be both the principal organ that facilitates indigenous peoples' voices to be heard on a global level and the organ that monitors the implementation of the Declaration. According to Article 42 the UNPFII is to "promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration." [850] The Forum provides a platform for constructive dialogue between indigenous peoples' and state representatives and identifies the principal areas that require attention. It is a unique platform for indigenous peoples because they participate on a level of full equality with state representatives.

IV.1.2.2 The Expert Mechanism on the Rights of Indigenous Peoples

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) is the second and newest UN body that deals with indigenous issues exclusively. The EMRIP was established by the Human Rights Council in 2007 and is a subsidiary body of the Council. [851]The EMRIP is made up of five independent experts who are appointed by the Human Rights Council. In choosing the members, the Council takes into account geographical distribution, gender balance, and indigenous origin.[852] During its annual sessions, representatives from states, indigenous peoples, civil society, IGO's, and academia take part in the debate about the current issues. According to its mandate, the EMRIP studies specific pressing themes and presents them in the form of studies and research to the Council. The EMRIP may also suggest certain proposals for research to the Council.[853] In 2009 the EMRIP completed its first study on the right to education. It has also produced studies on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, on best practices regarding possible appropriate measures and

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[850] Genugten W J M van et. al, *The United Nations of the Future, Globalisation with a Human Face* (KIT publishers, 2006), p. 67. Also see Article 42 of the U.N. Declaration on the Rights of Indigenous Peoples: The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration. See: Report of the international expert group meeting on the role of the Permanent Forum on Indigenous Issues in the implementation of article 42 of the United Nations Declaration on the Rights of Indigenous Peoples, E/C.19/2009/2, 4 February 2009.

[851] Website of the Expert Mechanism:
http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx

[852] Website of the Expert Mechanism:
http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx

[853] Human Rights Council, Resolution 6/36. Expert mechanism on the rights of indigenous peoples, 17 December 2007.

implementation strategies in order to attain the goals of the UNDRIP and, most importantly, a number of studies on the right of indigenous peoples to participate in decision-making.[854] These studies have been examined in detail in Part III. The expert mechanism's studies focus on those areas in which the most pressing controversies or issues exist.

IV.1.2.3 The Special Rapporteur on the Rights of Indigenous Peoples

In 2001, the Commission on Human Rights appointed Rodolfo Stavenhagen as the first Special Rapporteur on the Rights of Indigenous Peoples. He was succeeded in 2008 by James Anaya.

The mandate of the Special Rapporteur can be found in Human Rights Council resolution 6/12, in which the Rapporteur is requested:

> To examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous people, in conformity with his/her mandate, and to identify, exchange and promote best practices;
>
> To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people and their communities and organizations, on alleged violations of their human rights and fundamental freedoms;
>
> To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people;
>
> To work in close cooperation, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Human Rights Council, relevant United Nations bodies, the treaty bodies, and human rights regional organizations

Apart from these activities, the Special Rapporteur is also requested to work in close cooperation with the UNPFII, and to participate in its annual sessions. Furthermore, the Rapporteur is held to promote the UNDRIP and to develop

[854] A/HRC/15/35, Progress Report on the study on indigenous peoples and the right to participate in decision making, Expert Mechanism on the Rights of Indigenous Peoples, 23 August 2010. A/HRC/EMRIP/2011/2, Final study on indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, 26 May 2011. A/HRC/18/43, Report of the Expert Mechanism on the Rights of Indigenous Peoples on its fourth session (Geneva, 11-15 July 2011), 19 August 2011.

a cooperative dialogue with all relevant actors. He should also take into account the special situation of children and women.[855]

The Special Rapporteur is an important figure for indigenous peoples. James Anaya, the second Special Rapporteur, had an important role to play as a mediator in situations in which conflicts between indigenous peoples and other actors were escalating. Furthermore, his annual and country reports provided valuable insight into the most pressing issues today. Anaya solved disputes through fair and equal negotiations, and had a very practical outlook on conflict resolution. His statements and reports have been discussed throughout this study.

As we will see when discussing the aftermath of the Saramaka People v. Suriname Case, the Rapporteur's task is a difficult one and he cannot always succeed in solving deep rooted differences between governments and indigenous representatives. The role of the Special Rapporteur is highly complex and he has to maneuver in tense, polarized conflict situations. His reports – country, thematic and annual – are influential and authoritative. Without a doubt, the Special Rapporteur has an important role to play in alleviating tensions and promoting indigenous rights.

IV.1.3 Conclusion: the Widespread Diffusion of FPIC Requirements

The preceding section indicated that FPIC requirements are present in a variety of different international developments and documents dealing with indigenous peoples. Participatory requirements – entailing consultation and consent, as much as possible in accordance with indigenous ways of decision-making – are becoming the standard in guiding relations between indigenous peoples and other actors.

The UN Human Rights Mechanisms have all taken up FPIC as an important norm for the protection of indigenous communities and FPIC is becoming a standard reference in a wide variety of policy instruments of international organizations.

Within the UN System, three mechanisms focus on the specific protection of indigenous peoples. The UN Permanent Forum on Indigenous Issues is a unique platform in which indigenous representatives can discuss their concerns on the international level on an equal level with state representatives. The Expert Mechanism, although still a rather new body, has provided detailed studies on a number of important and pressing issues. The UN Special Rapporteur, in exercising his broad mandate, has an important role to play in alleviating tensions in conflict situations between indigenous peoples and states.
Nevertheless, the formal legal status of FPIC remains unclear: different interpretations exist about its scope and content. Therefore, the following paragraphs will examine a number of cases and decisions from (mainly) the

[855] Human Rights Council Resolution 6/12. Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, 28 September 2007.

Inter-American Court and Commission on Human Rights. It is in this OAS framework that the most elaborate explanation about land and resource rights and FPIC is developed. It is of particular importance to review existing case law on FPIC, since the Courts are held to apply and explain the concept in relation to existing cases. Later on in Part V of this study, a number of implementation models for FPIC will be discussed.

V. PRACTICES

Part V of this study will discuss the most important legal and semi-legal cases on indigenous peoples' rights to land, resources and FPIC. Furthermore, a number of implementation models for FPIC that can be found in voluntary schemes for sustainable resource management will be examined and explained. In short, part V will discuss case law about, and implementation models for, FPIC.

V.1 Case Law: Legal and Semi-Legal Decisions

V.1.1 Introduction: Regional Protection of Indigenous Peoples' Rights and the Inter-American Human Rights System

Where Part IV illustrated the diffusion of FPIC norms in international law and policy, this paragraph will continue providing the most comprehensive *legal explanation* of FPIC, seen in combination with indigenous rights to land and resources. It will focus primarily on the Inter-American Human Rights system of the Organization of American States, since this is the platform in which the most progressive jurisprudential developments have taken place over the last decade.

While other regional platforms have contributed to the development of indigenous rights, specific judgments on land and participation rights have not been issued. One important exception is the decision of the African Commission on Human and Peoples' Rights in Endorois v. Kenya.[856] However, since the African Commission relies heavily on the jurisprudence of the Inter-American Court, the case will be integrated in the last part of these paragraphs.

Within the system of the European Court of Human Rights no landmark case on indigenous peoples land and participation rights has been delivered as of yet, even though the Court has jurisdiction over a number of states with indigenous populations.[857]

Conversely, the human rights entities of the OAS have issued a number of decisions and judgments that aim to build a comprehensive system of indigenous land and participation rights, which is in line with existing international norms on indigenous rights. Furthermore, it is only within the Inter-American System, that

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[856] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010.

[857] Koivurova T, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects,' 18 International Journal on Minority and Group Rights 1, 2011. Koivurova mentions the Saami in Norway, Sweden, Russia and Norway, the Inuit from Danish Greenland and numerous indigenous peoples in the Russian Federation.

FPIC is explained and applied. Therefore, the documents of the Inter-American Court and Commission will form the key materials for these paragraphs.

V.1.2 FPIC and Self-Determination in the Inter-American Human Rights System

The most important *legal* exposition of a system of self-determination, land rights, and participation has taken place in the framework of the human rights entities of the Organization of American States (OAS). The last decade there have been a number of interrelated decisions by the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights that clarify a number of questions concerning indigenous land and participation rights, and which are aimed at building a structural framework for the implementation of indigenous self-determination.[858] The Inter-American Court and Commission create the most comprehensive system of land and resource rights for indigenous peoples and, as will be illustrated, effective participation and FPIC play a vital role in this system.

These paragraphs will discuss the most relevant of these decisions and judgments, leading up to the most important case with regard to FPIC, the case of the Saramaka People v. Suriname from 2007.[859] This case will be explored in more detail for a number of reasons. Firstly, it is one of the more recent cases on indigenous land rights. Secondly, it is the first case in which FPIC is explicitly dealt with and it is the upshot to a more elaborate explanation of rights to consultation and consent. Thirdly, the Saramaka judgment reveals a number of issues that will have to be resolved in order to successfully implement FPIC processes, and finally, the Saramaka case is referred to by other regional and international human rights platforms frequently. Next, some cases and pending decisions in the aftermath of Saramaka people v Suriname will be explored, taking into account the difficult implementation process in "Saramaka" and the preceding decisions of the Court and Commission.

As observed in the first paragraphs of Part IV of this study, elements and traces of the principle of free, prior and informed consent can be distinguished in a number of international legal and quasi-legal documents. In order to further examine the scope of the standard setting on FPIC, it is necessary to examine it in light of existing cases. The remainder of this study is dedicated to examining the practical implementation of FPIC and participatory norms and argues that the flexible approach advocated earlier offers the best chance of successfully implementing FPIC processes. Instead of seeing FPIC as a single moment of decision-making, or a "veto-right" for indigenous communities, a better view of FPIC is that it entails a process of negotiation and consultation with the aim or requirement of reaching an agreement; a substantially more flexible interpretation.

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[858] 'the Commission or IACHR' and 'the Court or IACtHR'.

[859] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007).

However, there may be a number of situations in which full consent is a legal requirement.

There are a number of recent decisions within the framework of the Inter-American Human Rights system that involve indigenous peoples' rights to their lands and resources in which the Commission and Court have elaborated on the scope of FPIC and participatory structures.

The first decision to be examined is the *Awas Tingni* case, which was judged before the Inter-American Court in August 2001.[860] The Awas Tingni Judgment will be discussed at some length, because the Court explained its principled grounds for providing a system of protection for indigenous peoples' livelihoods in this case. Subsequently, two important decisions by the Commission will be discussed. The first one concerns the Commission Report on the well-known case of the Western Shoshone *Dann* sisters, published in December 2002.[861] The next decision deals with alleged land rights violations of *Maya communities* in Belize, dated October 2004.[862]

Next, two of the Court's judgments involving indigenous communities in Paraguay will be explored: the *Sawhoyamaxa* and *Yakye Axa* cases.[863] The *Moiwana community v. Suriname* case will also be briefly explored.[864] Although these cases involve a large number of legal issues of importance to indigenous peoples, the focus will be on land and property rights and its connection with participation and FPIC.

As mentioned, the most relevant case that will be assessed involves the November 2007 judgment of the Court in relation to the *Saramaka* people of Suriname.[865] In the paragraphs on the aftermath of the Saramaka case, some very recent petitions and cases from Suriname and the wider OAS region will be analyzed briefly. Especially the June 2012 *Sarayaku* case is highly relevant for consultation and consent rights.[866] While all cases deal with a number of important topics for indigenous peoples, when we will explore them in the context of the Inter-American System, the emphasis will be on those elements most relevant for our purposes.

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860 IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79.

861 IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002.

862 IACHR, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R. (2004), October 12 2004.

863 IACtHR, Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, Int.-Am. Ct. H.R., (Ser. C), No. 146. IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125.

864 IACtHR, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124.

865 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007).

866 IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245.

In brief, the paragraphs will illustrate that the Inter-American Human Rights System offers the most progressive and expansive *legal* model on how to ground and implement property rights-standards for indigenous communities. They offer a critical analysis of the case law of the Court and explore the advantages and drawbacks of the system in light of the substantive issues discussed in Part II and the participatory framework explained in Part III of this study. Before going into the substance of the cases and in order to make the content of these paragraphs understandable, a brief overview of the OAS human rights system and its preoccupation with indigenous rights is provided.

V.1.2.1 The OAS and Human Rights

The Organization of American States is a regional institution, created by states of the American continents. Formally established in 1948 at the Bogotá Conference, where the OAS Charter was signed on April 30, the OAS replaced the Pan American Union of 1910. Together with the Charter, the 21 participants of the Conference also adopted the American Declaration of the Rights and Duties of Man.[867] Currently all 35 states of the Americas are members to the OAS and have ratified the Charter.

The OAS policies address five general areas: first, it aims at strengthening democracy. Second, it promotes peace and stability in the region. Third, the organization aims at improving the rule of law. Fourth, the OAS aspires to strengthen the regional economy, and finally, the organization seeks to protect and promote human rights, especially regarding women's rights, children's rights and cultural rights.[868]

The Charter of the Organization of American States[869] established two main institutions designed specifically for protecting and promoting human rights in the Americas; the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.[870]

The Commission is the oldest entity, established in 1959.[871] Under Article 106 of the Charter, the Commission promotes and observes the protection of human rights.[872] The structure, competence, and procedure of the Commission are regulated in the Inter-American Convention on Human Rights, which was adopted in 1969 and entered into force in 1978. The Commission is composed

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867 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States in 1948.

868 http://www.hrea.org/index.php?base_id=150, The Human Rights Education Associates, consulted 16th of June 2008

869 Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* December 13, 1951.

870 http://www.hrea.org/index.php?base_id=150, The Human Rights Education Associates, consulted 16th of June 2008.

871 Declaration at the 5th Meeting of Consultation, Santiago, Chile, August 12-18, 1959. Final Act, OAS Official Records, OEA/Ser. C/II.5, page 10-11.

872 Charter of the Organization of American States, Chapter XV, Article 106, the Inter-American Commission on Human Rights.

of seven independent experts, all elected for a four year term by the General Assembly of the OAS.

Complaints (petitions) against a Member State have to be brought before the Commission first, which subsequently examines the admissibility, investigates the allegations, and tries to achieve friendly settlement of the dispute.[873] If necessary, the Commission prepares a report on the case.[874] An individual, group of individuals, or an NGO recognized in at least one OAS Member State may file a petition.[875] Problems with admissibility of group claims, like in relation to the Human Rights Committee before "Lubicon Lake Band" are therefore overcome in the OAS process.

The Commission can pursue the matter further and present a claim before the Inter-American Court if the state is a party to the American Convention and has accepted the Court's jurisdiction. The Court conducts a new evaluation resulting in a binding judgment with possible, monetary and other, compensatory measures. The Court was established with the adoption of the American Convention of Human Rights[876] and was formally inaugurated in 1979 in San José, Costa Rica.[877] The American Convention on Human Rights was concluded within the OAS framework and officially entered into force in 1978.[878] Final decisions of the Commission are presented in the form of a Report, which includes the facts and conclusions of the Commission, based on possible violations of the American Declaration of the Rights and Duties of Man.

If the case is not brought before the Court and no adequate measures have been taken by the responding State, the Commission may decide to publish the Report. The Commission's Reports are not formally legally binding, in contrast to the final decisions of the Court, which are presented as binding judgments, adopted by a majority of the seven judges.[879] As will be illustrated in the paragraphs on the Saramaka case, the Court also has the possibility to monitor compliance with its judgments and clarify interpretation issues.

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873 The friendly settlement procedure is not always that successful, for a discussion hereon, see: Anaya, 2004, pp. 258 -266.

874 Sands P and Klein P, *Bowett's Law of International Institutions* (Fifth Edition, Sweet and Maxwell, London, 2001), page 398.

875 The criteria for an admissible petition are listed in Articles 44 through 47 of the American Convention on Human Rights and in the Commission's Regulations.

876 American Convention on Human Rights, Article 33.

877 Sands P and Klein P, *Bowett's Law of International Institutions* (Fifth Edition, Sweet and Maxwell, London, 2001), page 398.

878 American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

879 Sands P and Klein P, *Bowett's Law of International Institutions* (Fifth Edition, Sweet and Maxwell, London, 2001), page 400.

V.1.2.2 The OAS and Indigenous Peoples

The protection of indigenous peoples is an area of special concern for the entities of the Inter-American Human Rights System. In 1972, the Commission stated that for historical reasons and for humanitarian and moral principles, states have a "sacred compromise to provide special protection for indigenous peoples." Since the 1980s, the Inter-American Human Rights bodies have systematically paid attention to indigenous peoples' protection through the case and report system.[880] A Special Rapporteurship on the Rights of Indigenous Peoples was established in 1990 with the purpose to bring the vulnerable position of indigenous peoples in the Americas under attention.[881]

The Commission expressed particular concern for the rights of indigenous peoples to their lands and resources, since the protection of these rights does not only imply the protection of an economic unit but is also aimed at shielding a community from outside interference with their cultural and social development, which is inextricably linked to their relationship with their lands. The Commission's concern for indigenous peoples' land and property rights is perhaps best illustrated in the 1993 report on the human rights situation of the Maya communities in Guatemala:

> From the standpoint of human rights, a small corn field deserves the same respect as the private property of a person that a bank account or a modern factory receives. [882]

Regarding the right to property, the Inter-American Court and Commission have established considerable jurisprudence on indigenous land and resource rights.[883] Apart from providing integrated argument on the position of indigenous peoples in international law, the Court and Commission present substantial information on the implementation of land rights and related norms

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[880] Annual Report of the Inter-American Commission on Human Rights 2007, OEA/Ser.L/V/II.130,Doc. 22, rev. 1, 29 December 2007, (Original: Spanish), point 56.

[881] Annual Report of the Inter-American Commission on Human Rights 2007, OEA/Ser.L/V/II.130,Doc. 22, rev. 1, 29 December 2007, (Original: Spanish), point 55.

[882] OEA/Ser.L/V/II.83, Doc. 16 rev., June 1, 1993, Fourth Report on the Situation of Human Rights in Guatemala, Chapter III, The Guatemalan Maya-Quiche Population and their Human Rights, (Original: Spanish).

[883] See, IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79. Also see, IACtHR, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124. Also see, IACtHR, Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, Int.-Am. Ct. H.R., (Ser. C), No. 146. Also see, IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007). Relevant decisions of the Inter-American Commission of Human Rights, see, IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002. Also see: IACHR, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R. (2004), October 12 2004.

of participation, consultation, and consent. Moreover, the Court's methods of awarding reparations to indigenous peoples – as collectives – have been highly acclaimed and might provide a model that has wider application than in the OAS area alone.[884] Examination of the relevant documents from the Court and Commission not only provided information on the legal status of FPIC, but also on how it could make real impact on the situation of indigenous groups, and what issues arise in relation to its implementation. But first, some words will be devoted to explaining the role of the judge in the development legal norms, since this is the central theme in the following paragraphs.

Purposive Interpretive Technique in the Inter-American Human Rights System

The Inter-American Court develops progressive interpretations of human rights in its cases on indigenous peoples. Therefore, it is important to first explore in what way judges and Court can interpret legal instruments and consequently get involved in law making.

When judges engage in law making, they inherently engage in interpretive exercise. Interpreting is not just ascribing meaning to a set of words but also concerns an act of persuasion; convincing a particular audience that a particular interpretation is the most appropriate meaning to adopt.[885] Therefore, it is essential that interpretive exercises by Courts are well reasoned and argued. Judicial interpretation of human rights treaties is necessary since the meaning of human rights provisions is often not clear from the outset.[886] In order to serve the object and purpose of a human rights treaty, which basically boils down to "making human rights provisions effective," Courts will have to interpret, explain, and apply the treaty's provisions in the context of specific situations.

There are of course many ways in which a judge can engage in interpretation and different goals that interpretation can pursue. For instance, Torben Spaak distinguished between four main interpretive arguments.[887] Judges can exercise *textual* interpretation, which serves the predictability of legal texts, they can *systemically* interpret laws, thereby promoting coherence and consistency. They can employ a strict *intentionalist* interpretative method – or what former Israeli Supreme Court President Aharon Barak called subjective interpretation – and in doing so serve the democratic underpinnings of a legal system, since laws give expression to the will of the legislator and consequently

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884 Lenzerini F (ed.), *Reparations for Indigenous Peoples, International and Comparative Perspectives* (OUP, 2008). Also see: Rombouts S J and Contreras-Garduño D, 'Collective Reparations for Indigenous Communities before the Inter-American Court of Human Rights', Merko*urios*, Utrecht Journal of International and European Law, Volume 27/Issue 72, 2010, pp. 04-17.

885 Tobin J, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation', 23 Harv Hum Rts J 1, 2010, p. 4.

886 Killander M, 'Interpreting Regional Human Rights Treaties', SUR – International Journal on Human Rights, v. 7, n. 13, dec. 2010, p. 145.

887 See: Spaak T, 'Legal Positivism and the Objectivity of Law', research paper for the Swedish Research Council, Uppsala University, 2003.

the people in ideal democratic theory. Finally, the judge can make use of teleological interpretation, which means that the judge regards the statute as a means to an end. Such interpretation appeals to our sense of rationality, since we intuitively concede that laws should be effective.

A particular theory on such teleological interpretation (a term better known in civil law than in common law countries) can be found in Aharon Barak's preferred method of interpretation, which will be briefly examined in this paragraph since it bears resemblances to the IACtHR's method of evolutionary interpretation.

However, the baseline for treaty interpretation in international law can be found in the Vienna Convention on the Law of Treaties (VCLT).[888] The VCLT contains three articles on treaty interpretation, which are now widely used and cited by international and regional courts and scholars as tools of interpretation. In Article 31 of VCLT the "general rule of interpretation" is provided. In Article 32 the "supplementary means of interpretation" is described; and in Article 33 the rules in the case a treaty is authenticated in multiple languages are laid down. While only states have ratified the VCLT, it is recognized as reflecting customary international law and is also applicable to international human rights monitoring bodies.[889]

In Article 31 it is provided that a treaty "shall be interpreted in *good faith* and in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its *object* and *purpose*." It is often not possible to determine the ordinary meaning of a text without considering its context, and regional human rights bodies have emphasized the importance of the broader context in interpreting human rights provisions.

Therefore, in Article 31(3) it is explained that, in addition to the context, in interpreting treaties one should take into account: "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and "any relevant rules of international law applicable in the relations between the parties." Norms, or emerging norms, of customary international law and existing international law are thus taken into account to interpret treaties. The Inter-American Court has taken the position that it is not necessary that the relevant State has ratified the treaty that is used to aid in interpretation.[890]

In Article 32 of the VCLT it is provided that supplementary means of interpretation may be used to confirm the meaning that resulted from the application of Article 31. Such supplementary means, like *travaux préparatoires* or the circumstances under which a treaty was concluded, may be invoked when interpretation according to Article 31 leaves the meaning of the provision(s)

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888 Vienna Convention on the Law of Treaties, 1969, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331.

889 Killander M, 'Interpreting Regional Human Rights Treaties', SUR - International Journal on Human Rights, v. 7, n. 13, dec. 2010, p. 145.

890 Killander M, 'Interpreting Regional Human Rights Treaties', SUR - International Journal on Human Rights, v. 7, n. 13, dec. 2010, p. 149. The ECtHR has adopted a similar position.

ambiguous or obscure, or leads to results that are manifestly absurd or unreasonable.[891]

The Inter-American Court has elaborated upon its system of interpretation and the relation with the VCLT on various occasions but perhaps most clearly in the Mapiripán Massacre case:

> The Court has pointed out, as the European Court of Human Rights has too, that human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolutive interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well those set forth in the Vienna Convention on Treaty Law. In this regard, when interpreting the Convention it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being.[892]

The Court thus perceives human rights treaties as "living instruments" and therefore an evolutionary approach towards interpretations is needed. Originalism, in other words the real - original - intent of the contracting parties, plays a limited role in interpreting human rights treaties. Moreover, the Court explained that it is the "pro homine principle" that should be guiding interpretation; the alternative most favorable to the protection of the involved rights is to prevail. In its case law on indigenous peoples, the Court relied on this system of evolutionary interpretation. Therefore it is useful to examine this concept in a bit more detail. Aharon Barak's system of purposive interpretation appeals in this respect and will be discussed to clarify the way in which interpretative techniques are to be applied.

Barak proposed a system of purposive interpretation. According to this method, it is not possible to know how to interpret the law unless the goal of such interpretive exercise is explicit. The goal of interpretation in general is to achieve the purpose of the law or a particular legal text. Of course, law has a purpose; it is a social device. The goal of interpretation is to achieve the social goal a particular law and the legal system as a whole perceive.[893]

In general Barak's conception of interpretation concerns "rational activity giving meaning to a legal text," and that should be perceived as both the principal and the most important tool a court possesses.[894] Interpretation concerns a process where the legal meaning of a text is extracted from its

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[891] Vienna Convention on the Law of Treaties, 1969, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, Article 32.

[892] IACtHR, Case of the "Mapiripán Massacre" v. Colombia. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, par. 106.

[893] Barak A, *Purposive Interpretation in Law* (Princeton University Press, 2005), p. xv.

[894] Barak A, *The Judge in a Democracy* (Princeton University Press, 2006), p. 122. (Barak, 2006)

semantic meaning. In interpreting a legal text, the interpreter thus transforms static law into dynamic law.[895] In the following paragraph, when discussing the Awas Tingni case and later decisions of the Inter-American Court of Human Rights, it will be illustrated that this is exactly what the Court engages in.

Barak sought to answer the question which method of interpretation is the most feasible, while he acknowledged that there is indeed a variety of different methods of interpretation, as was noted at the outset of this paragraph. What is common to these interpretive systems is that they bear on the relation between the words and the spirit of the law and adopt a position on the relationship between the real and hypothetical intent of the legislator.[896]

Barak proposed, as the preferred method, a theory on purposive interpretation. Accordingly, the aim of interpretation in law is to realize the purpose of the law. The underlying idea is that law is a tool specifically designed to realize a social purpose.[897] One should therefore interpret a particular legal text in the context of society and of the legal systems and underlying values as a whole. According to Barak, purposive interpretation is the most proper method for achieving these goals.

The theory of purposive interpretation Barak proposed arguably provides for a comprehensive theory and clarifies whether purposive interpretation should be regarded as subjective, objective, or a blend of the two.[898] He stated that "purpose" is a normative concept that entails both a subjective element – the real intent of the author – and an objective component – the hypothetical intent that a reasonable author would want to realize through the given legal text.[899] At a high level of abstraction such objective purpose aims to serve the fundamental values that are implicit in a given legal system. The true purpose of a legal text therefore is determined by the relationship between the various objective and subjective elements.[900]

The proper relation between these objective and subjective elements is determined by the particular text that is under consideration. Barak provided – as an example – that one should interpret a constitution in light of what its meaning is today, and not for instance what it was in the 19th century.[901] This way the objective purpose is of greater value. The legal text should be accorded a modern meaning and not be frozen in time. In this light, Manfred Lachs has noted similarly that: "In law we must beware of petrifying the rules of yesterday and thereby halting progress in the name of process. If one consolidates the past and calls it law he may find himself outlawing the future."[902]

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895 Barak, 2006, p. 123.
896 Barak, 2006, p. 123.
897 Barak, 2006, p. 124.
898 Barak, 2006, p.125.
899 Barak, 2006, p. 126.
900 Barak, 2006, p. 126.
901 Similar to the "living instrument doctrine" of the IACtHR, discussed above.
902 Lachs M H, President of the ICJ, 'Commemorative Speech at the United Nations General Assembly', October 12th 1973.

However, this is not to be understood as a plea for "judicial activism," which sometimes has some negative connotations. In interpreting legal texts, the judge should take into account the normative umbrella of *fundamental principles* that underlie the legal system as a whole. These are of course not the judge's own personal values, but should be reflective of the social consensus that underpins the legal system.[903] As such, Barak regarded the judge as a partner to the authors of the text; the authors formulate a will that they wish to realize and the judge locates this will within the larger picture of the text's role in contemporary society. The judge thus must strike a balance between the authorial intent and the fundamental values of the legal system (or systems) under scrutiny.[904]

Every statute has a particular purpose and, as mentioned, this purpose (or *ratio legis*) comprises both subjective and objective elements. The *subjective* purpose that has to be taken into account in interpretive exercise by courts reflects the actual intention of the "legislator" or author of a text. This subjective element consists therefore of the real policies that the authors wanted to actualize.[905] Such subjective purpose is revealed through scrutinizing all relevant credible and available sources.

Focusing only on the subjective purpose of a text inherently entails the danger that it is not regarded as a living instrument in a changing environment. Rather, it "freezes" a meaning at the moment of enactment without being reflexive of current societal needs and problems. Therefore, in addition to subjective purpose, the aim of the judge is also to depict the *objective* purpose of a legal text. This objective purpose consists of the interests, values, objectives, policies, and functions that the law should realize in a democratic system.[906] It therefore does not necessarily reflect the authors' subjective (i.e. real) intent. Barak stated that at a low level of abstraction, such objective purpose reflects the intent of a reasonable legislator. At a higher level, it concerns the purpose that should be attributed to that particular text and at the highest level of abstraction, objective purpose should be aimed at the realization of the fundamental values of liberal democracy.[907]

The judge can learn such objective purpose by looking at the language of a text, by examining the subject regulated by it, and by scrutinizing the nature of the arrangement.[908] Furthermore, consistent with the VCLT, the interpreter can reveal the objective purpose by investigating closely related statutes.[909] It will be shown that the Inter-American Court does not only take into account the American Convention on Human Rights (the Convention) but also looks at the broader body of international law dealing with human rights, and indigenous peoples' rights in particular. As such the IACtHR also advances forms of

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[903] Barak, 2006, p. 135.
[904] Barak, 2006, p. 135.
[905] Barak, 2006, p. 137.
[906] Barak, 2006, p. 138.
[907] Barak, 2006, p. 138.
[908] Barak, 2006, p. 139.
[909] Barak, 2006, p 140.

systemic interpretation, perceiving the Convention in light of existing international law and aiming at building a coherent and consistent system. Furthermore, the judge should look at the historical and social development of the legal text. Finally and perhaps most importantly, the judge should take into account, as said before, the fundamental principles of the legal system, which constitute the very spirit of the text.

Barak's scheme of purposive interpretation is focused on subjective and objective elements, but the objective purpose that can be attributed to a legal text is seen as more important, since law is a dynamic notion that should be reflexive of society on an ongoing basis. In his arguably correct view, "the statute is always wiser than the legislator" and by purposively interpreting a legal text, the judge gives it a dynamic meaning and subsequently bridges the gap between law and society.[910]

In the next paragraphs it will be illustrated that the Inter-American Court adheres to such a perception on legal interpretation by understanding the Convention in light of contemporary needs of indigenous communities throughout the Americas. The Court engages in an exercise of judicial law making in purposively interpreting the Convention to include a communal property rights and related rights for indigenous peoples, taking into account the underlying values of the legal order (the spirit of the Convention).

In applying what the Court terms a "evolutionary and universalistic approach" it focuses on the objective purpose of the Convention and takes into account the broader body of international human rights law that pertains to the protection of indigenous peoples. The key judgments and decisions will be discussed below.

V.1.2.3 Self-determination, Land Rights and Participation in the Inter-American System

V.1.2.3.1 Awas Tingni v. Nicaragua

The milestone decision dealing with indigenous peoples' rights to land and resources is the case of the Awas Tingni Community v. Nicaragua.[911] In its judgment of August 2001, the Inter-American Court held that the international human right to hold property includes the right of indigenous peoples to the protection of their customary land and resource tenure.[912]

In the opinion of the Court, the State of Nicaragua violated the property rights of the Awas Tingni Community by granting logging concessions to the community's territory to a foreign company and by failing to provide effective

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910 Barak, 2006, p. 142.

911 IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79.

912 Anaya S J and Grossman C, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples', Arizona Journal of International and Comparative Law 19, 2002, page 1.

protection and recognition of the community's customary land tenure.[913] The community members found out about these logging concessions only when they discovered loggers already working on their territories. When the Mayagna Indians of Awas Tingni petitioned the Commission in 1995, problems were exposed that continued to persist for the Mayagna, Miskito, and other indigenous peoples in the coastal region, even though Nicaragua formally recognized indigenous peoples' land tenure in its Constitution and laws.[914]

The Nicaraguan government *de facto* continued to regard the indigenous lands as state-owned, which justified granting the logging concessions. While the State agreed to a friendly settlement, as suggested by the Commission, no progress was made and after two years the Commission made a determination of state responsibility and submitted its confidential report to the government. Nicaragua subsequently failed to indicate its willingness to implement the Commission's recommendations regarding securing the Awas Tingni traditional lands,[915] and the Commission submitted the case to the Inter-American Court of Human Rights in June of 1998.[916]

In its final ruling of 31 August 2001, the Court reaffirmed that indigenous peoples have rights to their traditionally used and occupied territories, and that these rights arise autonomously under international law.[917] The Court assessed that Nicaragua had violated the Convention by failing to make the land and resource rights that were already recognized in Nicaraguan law effective.

The state's failure in effectively responding to the Awas Tingni community's request for the titling of their lands in combination with the inadequate action on behalf of the Nicaraguan courts to timely provide for a legal answer, led to a violation of Article 25 of the Convention, which is the right to judicial protection.[918] The Court acknowledged that the implementation of domestic legal protections for indigenous peoples is an obligation arising under the American Convention on Human Rights and that states may suffer international responsibility if they fail to effectuate these rights.[919]

The novelty and most important part of the Court's decision lies in the recognition of indigenous peoples' right to property and the subsequent

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913 Anaya S J and Grossman C, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples', Arizona Journal of International and Comparative Law 19, 2002, page 2.
914 Anaya, 2004, page 267.
915 Anaya, 2004, page 267.
916 S Anaya S J and Grossman C, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples', Arizona Journal of International and Comparative Law 19, 2002, page 3.
917 Page A, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', Sustainable Development, Law and Policy 16, 2004, 2004, page 16.
918 IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79, paragraph 173.
919 Anaya S J and Grossman C, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples', Arizona Journal of International and Comparative Law 19, 2002, page 12.

violation thereof by the state. Most significantly, the Court held that the concept of property under Article 21 of the Convention, for indigenous peoples means a communal property-right.

> Article 21: Right to Property
>
> **Everyone** has the right to the use and enjoyment of **his property**. The law may subordinate such use and enjoyment to the interest of society.
> **No one** shall be deprived of **his property** except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
> Usury and any other form of exploitation of man by man shall be prohibited by law.[920]

Although a grammatical interpretation of the provision suggests an individualistic scope, the Court's interpretation of the American Convention on Human Rights constructs the right to property in such a way that the right of an indigenous community to govern itself and to collectively hold lands are protected as well.

The Court stated that: "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community."[921] This form of collective property is strikingly different from the "Western" legal notion of private property as:

> The close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[922]

Similarly, as was mentioned in Part II, José Martinéz Cobo, observed already in 1983 that:

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[920] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). Emphasis added.
[921] IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79, paragraph 149.
[922] IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79, paragraph 149.

> It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions, and culture. For such people, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.[923]

Cultural and spiritual ties thus played a major role in the Court's decision. Judges Cançado-Trinade, Gómez, and Burelli also underline this in their separate opinion in which they stress the importance of the *intertemporal dimension* of the relationship between indigenous peoples and their lands. They stated that:

> Without the effective use and enjoyment of these latter (their lands), they would be deprived of practicing, conserving and revitalizing their cultural habits, which give a meaning to their own existence, both individual and communitarian. The feeling which can be inferred is in the sense that, just as the land they occupy belongs to them, they in turn belong to their land. They thus have the right to preserve their past and current cultural manifestations, and the power to develop them in the future.[924]

In establishing this progressive reasoning on communal property, the Court looked into recent developments in international law and stated that such international legal conceptions have an "autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law."[925] Apparently, the Court assumed the emergence of elements of new international customary norms.[926] The Court inquired into the core values of the American Convention's property provisions in association with contemporary developments in international law and interpreted the right to property as also entailing indigenous peoples' collective rights to their lands.[927]

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[923] Martinés Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21 /Add.8, page 26, at 197.

[924] Joint Separate Opinion of Judges A.A. Cançado Trinande, M. Pacheco Gómez and A. Abreu Burelli to the Awas Tingni Case, Arizona Journal of International and Comparative Law 19, 2002, page 455.

[925] IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79, paragraph 146.

[926] Eide A, 'Rights of Indigenous Peoples, Achievements in International Law during the Last Quarter of a Century', Netherlands Yearbook of International Law, 163, 2006, page 174.

[927] Anaya S J, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', Colorado Journal of International Environmental Law and Policy 16, 2005, page 253.

The Court used an "evolutionary" method of interpretation,[928] taking into account modern conceptions of indigenous property rights and the special relation indigenous peoples have with their lands and territories.[929] The Court applied this evolutionary approach or purposive interpretive method from a pragmatic point of view, instead of engaging in a more formalistic interpretive exercise.[930]

For the first time, the Court referred to a violation of human rights principles, as set forth in the American Convention, from the standpoint of collective property rights of indigenous peoples as subjects of international law.[931]

The Court assessed that although the Nicaraguan Constitution formally recognized such a communal property right, the government had subsequently failed in effectively delimiting and demarcating the limits of the indigenous territory.[932] This is a very important aspect of the Courts decision, since these are very practical requirements - and obligations for the state - for upholding land rights. The Court found that in order to fulfill its obligations under the Convention, Nicaragua was required to: "Carry out the *delimitation, demarcation and titling* of the corresponding lands of the members of the Awas Tingni Community, within a maximum term of 15 months, *with full participation by the Community* and taking into account its *customary law, values, customs and mores*."[933] Demarcation of the land could only proceed with the *participation* of the community and in accordance with its *customary law*, which implicitly underlines the importance of the principle of self-determination.

Although FPIC was not yet explicitly used in this case, the Court held that the community's right to its own property prevents the national government from unilaterally exploiting community natural resources.[934]

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928 IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79, paragraph 148.

929 S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend,* Colorado Journal of International Environmental Law and Policy 16, 2005, page 253.

930 *Cf.* Anaya S J, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', Colorado Journal of International Environmental Law and Policy 16, 2005, p 258. UN Special Rapporteur James Anaya remarks that: "*Formalist and backward-looking postmodern critical approaches largely overlook the evolution in values and power relationships at the expense of genuine problem solving that could be achieved on the basis of cross-cultural understanding." Cf.* A. Barak, *Purposive Interpretation in Law*, Princeton University Press, 2005. A. Barak, *The Judge in a Democracy*, Princeton University Press, 2006.

931 Alvarado L J, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua', Arizona Journal of International and Comparative Law 24, 2007, page 612.

932 IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79, paragraph 153.

933 *Ibid*., paragraph 164. Emphasis added.

934 Page A, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', Sustainable Development, Law and Policy 16, 2004, page 16.

Such a notion of "veiled" territoriality through the concept of communal land rights is essential for the protection of indigenous peoples and the implementation of participatory standards. In the Court's interpretation of the American Convention on Human Rights the right to property is constructed in such a way that the rights of an indigenous community to govern itself and to collectively hold lands are protected as well.

In the Awas Tingni judgment the importance of the notions of self-determination and collective rights for indigenous peoples is implicit. Furthermore the Court developed the criterion that the form of the participatory process as possibly entailing consent requirements should be determined by considering and respecting the indigenous practices and customs.[935]

The following cases all use the Awas Tingni decision as an important precedent. The notion of communal property seen together with its cultural value and the relevance of international human rights instruments as developed by the Inter-American Court in the Awas Tingni case created a stepping stone for indigenous groups to claim control over their lands and resources. In their subsequent decisions the Inter-American human rights entities aimed at developing a structure for the implementation of land rights regimes. Although FPIC is not explicitly mentioned in the Awas Tingni decision, it is the foundation from which the development of the Inter-American opinion on FPIC departs.

The model based on Article 21 of the American Convention requires the *delimitation, demarcation*, and *titling* of indigenous lands with full *participation* of the community involved and taking into account its *customary law* and *decision-making systems*.

V.1.2.3.2 Decisions from the Commission: The Dann Sisters and Maya Communities in Belize

While the Court's judgments are legally binding, the decisions of the Commission have quite some force and authority as well. The Commission has been proactive in explaining and developing the Awas Tingni system. Two important decisions in which the Commission explains how FPIC fits into this system will be debated.[936] The first one, from 2002, is about the two sisters Mary and Carrie Dann, of the Western Shoshone Band in the US and their struggle to gain control over their ancestral lands.

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935 Page A, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', Sustainable Development, Law and Policy 16, 2004, page 17.

936 Another interesting case is that of the *Hul'Qumi'Num Treaty Group v Canada,* it was declared admissible by the Commission in 2009, but no decision on the merits has been taken. Inter-American Commission on Human Rights, Report 105/09, Petition 592-07, Admissibility, *Hul'Qumi'Num Treaty Group v Canada*, October 30, 2009. This case will also deal with property rights and consultation rights.

The second decision, in which the Commission explored the meaning of FPIC in relation to indigenous land rights, is one from Belize. A number of Maya communities claimed that the State provided concessions for oil drilling on their lands without their consent. The Commission published its decision in 2004.

Mary and Carrie Dann v. United States

In 1993 the Dann sisters, leaders of a Western Shoshone band, petitioned the Inter-American Commission after decades of struggle in and out of courts in the United States to gain control over their lands.[937] As in the Awas Tingni case, a process of friendly settlement was not effective. After issuing its decision that the case was admissible, the US ignored the Commission's request for information for over a year and rejected the proposal for a friendly settlement process.[938] The United States continued to deny the Dann band and other Western Shoshone people access to their lands and it was not until the Commission communicated a confidential report to the State that the US Government responded on the merits of the dispute.[939] In its written response, the US implicitly acknowledged to be a subject to international human rights obligations but subsequently disagreed with the commissions interpretations[940] and rejected the Commission's findings in its entirety.[941]

The Western Shoshone or "Newe" people occupied a large part of the American west before the European conquest and colonization. The society had a decentralized structure, with small communities that came together periodically to make decisions for the greater community.[942] In 1863 the Federal Government signed a treaty with the Western Shoshone people, which affirmed their land rights.[943] In practice, however, the infringements on their territories continued to persist. In 1946, pressured by the declining health and welfare within the Indian communities, the US decided to set up an Indian Claims Commission (ICC), in order to provide financial relief for the indigenous communities whose lands where taken.

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937 The sisters' struggle for Western Shoshone land rights has been going on for over forty years, there appears to be no short-term solution to the conflict since the U.S. does not recognise the Commissions' decision. Mary Dann deceased april 23th 2005, her passing was caused by an accident working on her ranch. The Western Shoshone bands reside in Idaho, California, Nevada and Utah.

938 Anaya, 2004, page 263.

939 Anaya, 2004, page 264.

940 On the grounds for rejecting the Commission's findings see: Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. C.H.R. (2001), December 27 2002, paragraph 150.

941 IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002, paragraph 148.

942 Page A, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', Sustainable Development, Law and Policy 16, 2004, page 17.

943 Known as: "The Treaty of Ruby Valley".

Unfortunately, this led to the practice that the ICC could declare Indigenous land titles extinguished in order to provide financial relief alone. In 1977 after a doubtful procedure,[944] the ICC decided that Western Shoshone land rights had been extinguished and that monetary compensation would be provided for. As the Dann band was already engaged in litigation over a trespass conflict,[945] they heard the ICC judgment denying them their land rights without any form of participation in the process. The Western Shoshone people persisted in stating that they did not want to receive monetary compensation for their lands. This is perhaps best illustrated by the words of Carrie Dann, which are once again indicative of the special relation indigenous peoples have with their lands:

> Maybe as Americans you can sell land to others, but we as Indigenous people can not. The word Sogobee (or bia) means Earth Mother, the very essence of our life comes from the land (Earth Mother).[946]

After a long process of national litigation, the Danns finally turned to the Inter-American Commission in 1993 and invoked similar rights as those in the Awas Tingni Case.[947] The main conclusions of the Commission regarding the alleged violations of Articles XVIII and XIII of the American Declaration of the Rights and Duties of Man[948] will be discussed below.

In elaborating on the Awas Tingni judgment regarding the value of international human rights standards, the Commission concluded that:

> In addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as

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944 For more on the ICC procedures see: Page A, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', Sustainable Development, Law and Policy 16, 2004. Also see: Anaya, 2004, pp. 146-147. Also see: Gómez V, 'The Inter-American System', Human Rights Law Review, Volume 3, Number 1, 2003, pp. 127 - 133.

945 Page A, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', Sustainable Development, Law and Policy 16, 2004, page 17.

946 Statement by Carrie Dann, Western Shoshone grandmother, June 1, 2004, www.treatycouncil.org, consulted 13 July 2008.

947 These included: the right to equality, the right to property and the right to judicial protection.

948 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States in 1948. Article XVIII, the right to a fair trial, reads: Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights. Article XXIII, on the right to property, reads: Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

> reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands.[949]

Based upon this opinion, the Commission stated that the provisions of the American Declaration should be interpreted and applied with due regard to those human rights principles particular to indigenous peoples protection.[950] As will be further clarified in the Belize and Saramaka cases, other human rights instruments guide the Inter-American bodies in their decisions.

Regarding the right to property the Commission concluded that the US processes in adjudicating Western Shoshone land rights were not sufficient "to comply with contemporary international human right norms, principles and standards that govern the determination of indigenous property interests."[951] The participatory standard used by the US government was found to be inadequate. The Commission thus upheld the communal property regime - that arises autonomously under international law - as developed in the Awas Tingni case by the Court, and extended it to the applicable provision of the American Declaration on the Rights and Duties of Man.[952] The Commission then proceeded to frame the core criterion for participation with regard to land rights for Indigenous Peoples:

> The Commission first considers that Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a **process of fully informed and mutual consent on the part of the indigenous community as a whole.**[953] This requires at a minimum that **all of**

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[949] IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002, paragraph 124.

[950] *Ibid*., paragraph 131.

[951] *Ibid*., paragraph 139.

[952] Anaya S J, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', Colorado Journal of International Environmental Law and Policy 16, 2005, page 253.

[953] Page A, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', Sustainable Development, Law and Policy 16, 2004; Alex Page refers to the criterion as entailing "*consent of the whole community*". I believe this is inaccurate since the criterion that was developed by the Commission, requires "*consent of the community as a whole*." This requires that the community, as a collective, makes an informed decision, instead of requiring unanimity.

> **the members of the community are fully and accurately informed** of the nature and consequences of the process and **provided with an effective opportunity to participate individually or as collectives.**[954]

Here the Commission elaborated on the criterion of FPIC for indigenous peoples. According to the Commission, consent must be given on the part of the indigenous community "as a whole" which entails at least optional participation by all members. This definition is upheld by the Commission and Court in the following decisions.

In summary, the Commission in the Dann case argued (for the first time) that FPIC is an essential criterion for the implementation and safeguarding of indigenous land rights. In the decision the Commission restated and extended the communal land right doctrine developed by the Court in the Awas Tingni case, and underlined its reliance on developments and trends within international law in relation to indigenous peoples. Examination of the following decisions and judgments will show that the Court and Commission expand their system of indigenous land rights, and aim to create a coherent opinion on participatory norms and FPIC.

Maya Communities v. Belize

In 2004, the Commission published its Report on a petition presented to the Commission against the State of Belize, filed by the Maya Indigenous Communities of the Toledo district, represented by the Indian Treaty Council and the Toledo Maya Cultural Council.[955] Like in the Dann case, the petitioners allege violations of the American Declaration of the Rights and Duties of Man, with respect to lands traditionally occupied and used, in this case, by the Maya people. In particular, the petitioners claimed violations of their rights to property, equality, judicial protection, consultation, and self-determination.

The conflict arose when the Belizean government granted logging and oil concessions on Maya lands without obtaining the *consent* of the Maya communities. Belizean law considered these lands under the discretionary authority of government, and the actions taken by the State threatened to inflict severe harm on more than three dozen Maya villages in Southern Belize.[956] After domestic remedies failed, the Maya communities filed a petition to the Inter-American Commission in 1998. Once again, the friendly settlement procedure failed,[957] and in 2000 the Commission declared the case admissible.

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954 IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002, paragraph 140. Emphasis added.
955 IACHR, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R. (2004), October 12 2004, paragraph 1.
956 Page A, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', Sustainable Development, Law and Policy 16, 2004, page 18.
957 Anaya, 2004, page 265.

The Commission built on the arguments developed in the Awas Tingni case and the Dann report, reaffirming the statement that the American Declaration should be interpreted and applied in the context of developments in the field of international human rights law.[958] The Commission referred to the Awas Tingni case in assessing the concept of communal property, in the sense that the ownership of the land is centered on the group and its community collectively.[959] Furthermore, the Commission restated its opinion in the Dann report, repeating that the State is responsible for:

> The taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with **fully informed consent**, under conditions of equality, and with fair compensation.[960]

The Commission noted that the rights to property and to judicial protection, as enshrined in the American Declaration, and further expanded its reasoning:

> Specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon **a process of fully informed consent on the part of the indigenous community as a whole**. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives[961]

Here the Commission confirmed the consent criterion as developed in the Dann report. The Commission continued with reaffirming the Court's position in the Awas Tingni case:

> In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the naturalresources of indigenous territories.[962]

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958 IACHR, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R. (2004), October 12 2004, paragraph 86.
959 *Ibid.*, paragraph 116.
960 *Ibid.*, paragraph 117. Emphasis added.
961 *Ibid.*, paragraph 142. Emphasis added.
962 *Ibid.*, paragraph 142.

The requirement that consent should be sought prior to the decision is illustrated in paragraph 143 where the Commission stated that there is no evidence that the State conducted effective consultations with the Maya communities *prior* to the granting of the logging licenses.

Eventually, the Commission concluded that the Maya people of southern Belize have a communal property right over their lands,[963] and that by granting oil and logging concessions to third parties, the State of Belize violated this right, as enshrined in Article XXIII of the American Declaration by:

> Failing to take effective measures to recognize their communal property right to the lands that they have traditionally occupied and used, and to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their right exists.[964]

The failure to demarcate the Maya traditional lands further infringes the right to property since:

> By granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled or otherwise clarified or protected, **without effective consultations with and the informed consent of the Maya people** and with resulting environmental damage, [the State] further violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people.[965]

Building upon earlier decisions, the Commission emphasized the need for a form of control over traditional lands, and a corresponding obligation for the state to delimit and demarcate these lands in consultation with the indigenous people(s) concerned and with the informed consent of the community. The failure of the State to engage in effective consultations, in the Commission's view, also led to violations of other provisions of the American Declaration and other international human rights and principles:

> The failure of the State to engage in meaningful consultation with the Maya people in connection with the logging and oil concessions in the Toledo District, and the negative environmental effects arising from those concessions, constitute violations of several other rights under international human rights law, including the right to life under Article I of the American Declaration, the right to

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963 *Ibid.,* paragraph 151.
964 *Ibid.*, paragraph 152.
965 *Ibid.*, paragraph 153. Emphasis added.

> religious freedom and worship under Article III of the American Declaration, the right to a family and to protection thereof under Article VI of the American Declaration, the right to preservation of health and well-being under Article XI of the American Declaration, and the **"right to consultation"** implicit in Article 27 of the ICCPR, Article XX of the American Declaration, and **the principle of self-determination**.[966]

The Commission did not find it necessary to determine the additional violations of international law, by stating in its final remarks that these are subsumed within the broad violations of Article XXIII of the American declaration. In the light of the paragraph quoted above, this illustrates the distinct nature of the right to property for indigenous people, considering the central role the traditionally used and occupied lands play in their physical, cultural and spiritual vitality.[967]

Without distinguishing one independent basis for FPIC in international law, the Commission did confirm the special relation between the indigenous – territorial land and resource – right to property and the principle of self-determination. Consultation and consent are the requirements for effective protection of indigenous lands and resources and they are based on the interrelated concepts of self-determination and communal property rights for indigenous peoples.

In the report in the Belize case the Commission reaffirms the special status of indigenous lands, assesses the existence of communal property rights over these lands, and acknowledges that the interrelated concepts of property rights and the principle of self-determination form the basis of the concept of free, prior and informed consent. It is the combination of the Awas Tingni jurisprudence, the explanation of FPIC as a necessary requirement for altering land rights, and the grounding of this system in the principle of self-determination, that make this case so important.

In the domestic litigation that followed the Commission's report, the Court recognized the Maya indigenous title and supported that conclusion. On October 18 2007, the Supreme Court of Belize issued its decision, which affirmed the rights of the Maya communities to their traditional lands. The judgment relied heavily on international law, primarily on the Convention on the Elimination of all forms of Racial Discrimination. CERD General Recommendation XXIII was cited, which recognizes FPIC in relation to the protection of indigenous peoples' communal lands. It is noteworthy that ILO Convention 169 was cited and, more importantly, that UNDRIP was referred to. The Court mentioned that: "Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general

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966 *Ibid.*, paragraph 154. Emphasis added.
967 *Ibid.*, paragraph 155.

international law, states are not expected to disregard them." and cited article 26 of the UNDRIP.[968]

V.1.2.3.3 Subsequent Cases of the Court: Moiwana, Yakye Axa and Sawhoyamaxa

The Awas Tingni and the decisions of the Commission in the Dann and Maya cases confirmed that indigenous peoples have rights to their traditional lands and that in order for these rights to become effective, participatory structures have to be implemented. Affirmation of the land rights of indigenous peoples, under the right to property, led to a number of other questions and rights, connected to land and participation.

In the 2007 Saramaka case the Court would explain how collective property rights relate to FPIC and natural resources. It was preceded by three important and related cases in 2005 and 2006. In the Moiwana, Yakye Axa and Sawhoyamaxa Cases, the Court elaborated upon its earlier judgments, especially in relation to dispossession. In all three cases, indigenous or tribal communities lost access to their traditional lands and the Court had to argue to what extent the land rights of the communities still existed, even though they no longer resided there. Since there is much overlap and similarity between the cases and the legal issues that arose in them, the three cases form a cluster and will be dealt with together.

Dispossession of Traditional Lands

Both in Sawhoyamaxa and Yakye Axa, as well as in Moiwana, the indigenous communities lost their traditional lands and wanted to return there. The cases offered the Court a chance to further explain its reasoning on indigenous land rights. While FPIC is not explicitly mentioned in these cases, they are imperative for a proper understanding of the Court's system.

In *Moiwana v. Suriname*, the village of Moiwana was the scene for one of the most horrific events of the Surinamese "war of the interior" that was fought between 1986 and 1992.[969] The village was the target of an incursion by government troops in 1986, who suspected that some members of the community were allied with the feared "Jungle Commando," a guerilla movement that fought for control over Eastern Suriname. Most of the village men were away at the time of events, and government soldiers killed over 40 people, amongst them a large number of children and women. Up to this day, no independent investigation of the events has ever been conducted. The remaining villagers fled Moiwana, most of them to French Guiana, and years later they dared to return and reclaim their traditional lands.

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[968] Supreme Court of Belize, consolidated claims No. 171 of 2007 and 172 of 2007, judgment of October 18th 2007.

[969] More on the Surinamese history and situation will be provided in the next paragraph on the Saramaka case.

The twin cases of *Yakye Axa* and *Sawhoyamaxa* offer another example of the often destitute situation of indigenous communities.[970] In these cases, most prominently in the *Sawhowyamaxa case*, the Court further explained its standpoint on the right to property, and links this to the right to life.

The *Yakye Axa* and *Sawhoyamaxa* indigenous communities traditionally subsisted as hunter-gatherers, but were displaced when non-indigenous groups acquired their territories.[971] Awaiting the outcome of the legal procedures they had started, both communities settled on a small strip of land between a highway and the fence that separated them from their traditionally occupied lands. Living conditions in these roadside settlements were appalling and the communities did not have access to basic health care, water, and food. [972]

In the *Yakye Axa* case, the Court declared that the restitution of land for indigenous populations must be guided primarily by the meaning of the land for them.[973] Apart from a violation of the right to property and the right to judicial protection, the Court also found a violation of the right to life, interpreted as entailing positive obligations for the state to protect the conditions necessary for life.[974]

Although all three cases are filled with important considerations concerning indigenous rights in the Americas, the focus here will be on how the Court tuned its system of property rights. This explanation is necessary for a proper understanding of Saramaka people v. Suriname and to get an accurate view of the Inter-American system of indigenous land rights protection.

Jurisdiction Ratione Temporis and the 'Continuing Violation Doctrine'

An important element in the three cases was whether the Court had jurisdiction *ratione temporis*, as the states involved claimed that the violation had taken place long before the jurisdiction of the Court was acknowledged. Although the

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970 IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125. IACtHR, Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, Int.-Am. Ct. H.R., (Ser. C), No. 146.

971 The Yakye Axa and Sawhoyamaxa cases are often mentioned together, since they are very similar in nature. However, the more recent decision in: IACtHR, Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, should be mentioned as well.

972 For a more elaborate overview of the *Yakye Axa* and *Sawhoyamaxa cases*, see: Citroni G and Quintana Osuna K I, 'Reparations for Indigenous Peoples in the Inter-American Court', in: F. Lenzerini, *Reparations for Indigenous Peoples, International and Comparative Perspectives* (OUP, 2008). Also see: Keener S and Vasquez J, 'A Life Worth Living: Enforcement of the Right to Health Through the Right to Life in the Inter-American Court of Human Rights', 40 Colum. Hum. Rts. L. Rev., 2008-2009.

973 IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 149.

974 IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 33.

debate was more elaborate in Moiwana, it also played a role in Yakye Axa and Sawhoyamaxa.

In *Yakye Axa* and *Sawhoyamaxa* the claims involved title to lands that were part of the traditional territory of the people concerned. At the time of the proceedings, and many years before, title had been registered in the name of a third party as part of a chain of property titles that reached back to the 19th century when the lands were sold through certain transactions on the London stock exchange.[975] Although the state in both cases never complained about the jurisdiction *ratione temporis*, the Commission did explain in its admissibility report that this was not an issue: "since the incidents alleged in the petition took place at a time when the obligation of respecting and guaranteeing the rights enshrined in the Convention"[976]

The "incidents" mentioned were; failure of the government to provide the community with sufficient assistance during the procedures that were enacted to claim their title in national law, failing to conclude those procedures with any satisfactory agreement, and preventing the community to conduct their traditional subsistence activities on their lands.[977] These incidents had of course taken place after 1989 when Paraguay recognized the jurisdiction of the Court.

Similar reasoning led the Court to recognize temporal jurisdiction in Moiwana, although the matter was somewhat different. The Court reasoned that the right to property of indigenous peoples was not time-barred, since the state was directly responsible for the displacement of the community.[978] The continuing violation doctrine was explained in paragraph 128 of the judgment:

> In the preceding chapter regarding Article 22 of the Convention, the Court held that the State's failure to carry out an effective investigation into the events of November 29, 1986, leading to the clarification of the facts and punishment of the responsible parties, has directly prevented the Moiwana community members from voluntarily returning to live in their traditional lands. Thus, Suriname has failed to both establish the conditions, as well as

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975 Bankes N, 'International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples', 47, Alberta Law Review, 2010. IACtHR, Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, Int.-Am. Ct. H.R., (Ser. C), No. 146, paragraph 73. IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125., paragraph 50.

976 Inter American Commission on Human Rights, Report 2/02 on Admissibility, Petition 12.313, Yakye Axa Indigenous Community of the Enxet-Lengua People, February 27, 2002, paragraph 33.

977 Bankes N, 'International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples', 47, Alberta Law Review, 2010. Inter American Commission on Human Rights, Report 2/02 on Admissibility, Petition 12.313, Yakye Axa Indigenous Community of the Enxet-Lengua People, February 27, 2002, paragraph 19.

978 Alcala D, 'Indigenous Peoples Right to Property in International Law: A Look at Saramaka People v. Suriname, The Inter-American Court of Human Rights', Selected Works, 2009.

> provide the means, that would allow the community members to live once again in safety and in peace in their ancestral territory; in consequence, Moiwana Village has been abandoned since the 1986 attack.[979]

The community's right to claim property over their lands was therefore not lost, and the failure of the state to accommodate restitution entailed the violation of the right to property. The Court explained:

> […] it has been argued that the alleged victims were forcefully displaced from their ancestral lands. Although this displacement supposedly occurred in 1986, their inability to return to those territories has allegedly continued. The Court, then, has competence to rule upon these alleged facts and their legal implications.[980]

The reasoning by the Court in these cases is highly relevant for indigenous communities who seek forms of restorative justice. It is often the case that indigenous peoples have been expelled (for diverging reasons) from their traditional lands, and the Court's argumentation makes clear that this does not have to extinguish property title to those lands. This way it is possible to apply the collective property reasoning to those cases in which indigenous peoples have been dispossessed or otherwise lost control over their traditional territories.

Further Elaboration on the System of Collective Property Rights: Restitution and Limitation

In *Moiwana village v. Suriname*, the N'Djuka people had evidently been unlawfully dispossessed of their territories. Therefore, the Court had little trouble in ascertaining that the community had a right to property over their traditional lands, even though they no longer possessed these. The Court reiterated its reasoning from Awas Tingni and stated that:

> […] the Moiwana community members, a N'djuka tribal people, possess an "all-encompassing relationship" to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole. Thus, this Court's holding with regard to indigenous communities and their communal rights to property under Article 21 of the Convention must also apply to the tribal Moiwana community members: their traditional occupancy of Moiwana Village and its surrounding lands – which has been recognized and

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979 IACtHR, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paragraph 128.
980 IACtHR, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paragraph 43.

> respected by neighboring N'djuka clans and indigenous communities over the years – should suffice to obtain State recognition of their ownership. The precise boundaries of that territory, however, may only be determined after due consultation with said neighboring communities.[981]

Restitution of their traditional lands was therefore necessary to end the continuing violation of article 21 of the Convention, and the Court therefore ordered Suriname to adapt its legislation and repair the situation.

In light of its conclusions in the chapter concerning Article 21 of the American Convention (supra paragraph 135), the Court holds that the State shall adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for their use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories.

> The State shall take these measures with the **participation and informed consent** of the victims as expressed through their representatives, the members of the other Cottica N'djuka villages and the neighboring indigenous communities, including the community of Alfonsdorp.[982]

Participatory requirements are central in the Court's order. Informed consent is mentioned for the first time and remedying the situation of the Moiwana victims is only possible with full participation of the communities involved. Furthermore, the Court explained that such participation can only take place through the community's own representatives. The informed consent requirement would be expanded and elaborated upon in *Saramaka People v. Suriname*, two years later.

In the *Yakye Axa and Sawhoyamaxa v. Paraguay*, the facts were a bit different, which forced the Court to make a more detailed analysis of the right to property, its possible limits, and its connected right to restitution. In these cases, the lands were lawfully acquired by third parties and restitution was not as "easy" as in Moiwana.

The Court did not fully explain the nature of the continuing property rights in Yakye Axa but needed the latter case of Sawhoyamaxa to complement its reasoning.[983] In the first case, the Court reiterated that indigenous conceptions of

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[981] IACtHR, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paragraph 133.
[982] IACtHR, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paragraph 209, 210.
[983] Bankes N, 'International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples', 47, Alberta Law Review, 2010.

property are important and protected by Article 21 of the Convention. Furthermore, it noted that Paraguay did recognize such communal property rights in its constitution and therefore had a national and international obligation to respect those rights. The Court also emphasized that the state had failed to meet its obligations to demarcate and delimit specific lands. In Yakye Axa, the Court's reasoning in respect of the relation and possible conflicts between individual and communal property claims was explored as follows:

> Now, when indigenous communal property and individual private property are in real or apparent contradiction, the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights, that is: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society.
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> Article 21(1) of the Convention provides that "[t]he law may subordinate [the] use and enjoyment [of property] to the interest of society." The necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right.[984]

The Court further explained that it is the State's duty to assess on a case-by-case basis how these standards should be applied to conflicts between private and ancestral property claims.[985] The state needs to take into account the basic arguments from the Awas Tingni case that indigenous territorial rights may include a broader en different concept than private property rights. Furthermore, the Court interpreted article 21 of the Convention in light of the broader body of international law, including ILO Convention No. 169.[986] The Court referred

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[984] IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paragraph 144, 145.
[985] IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paragraph 146.
[986] IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paragraph 127. Also see: E Tramontana, The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Resources, International Journal on Minority and Group Rights 17 (2010), p. 251.

to its advisory opinion on "The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process," according to which provisions of human rights conventions have to be applied taking into account the "corpus juris" of existing international law. A systematic interpretation is to be applied:[987]

> The corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.[988]

Indigenous property rights may pertain to the collective right to survival "as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations."[989] Disregarding this may lead to violations of other basic rights such as the right to cultural identity and restrictions on the right of private individuals to private property may be necessary to "attain the collective objective of preserving cultural identities in a democratic and pluralist society."[990] Indigenous property claims may thus trump private property claims by third parties.

The Court further clarified its reasoning a year later in *Sawhoyamaxa v. Paraguay*, in which the facts were very similar to those in *Yakye Axa*. In these cases, the Court based its reasoning more on the material and spiritual relation that indigenous peoples have with their lands, than on the "continuing violation doctrine" that was invoked in Moiwana. In Sawhoyamaxa, the Court summarized its jurisprudence on indigenous property rights and formulated the right to restitution in two central paragraphs, which, because of their importance, will be cited in full:

> Acting within the scope of its adjudicatory jurisdiction, the Court has had the opportunity to decide on indigenous land possession in

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987 Tramontana E, 'The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Resources', International Journal on Minority and Group Rights 17, 2010, p. 251.

988 IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paragraph 128.

989 IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paragraph 146.

990 IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paragraph 147.

> three different situations. On the one hand, in the Case of the Mayagna (Sumo) Awas Tingni Community, the Court pointed out that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration. On the other hand, in the Case of the Moiwana Community, the Court considered that the members of the N'djuka people were the "legitimate owners of their traditional lands" although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them. In this case, the traditional lands have not been occupied by third parties. Finally, in the Case of the Indigenous Community Yakye Axa, the court considered that the members of the Community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as measure of reparation, to individualize those lands and transfer them on a for no consideration basis.
>
> The following conclusions are drawn from the foregoing: 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights. The instant case is categorized under this last conclusion.[991]

A combination of the historic injustice argument and the special relationship indigenous peoples have with their lands are thus the main grounds on which the Court constructs a right to restitution.[992] In determining to what extent restitution could compromise private property rights, it seems necessary for the state to continue its efforts until a fair balance between public and private interests is restored.[993]

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[991] IACtHR, Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, Int.-Am. Ct. H.R., (Ser. C), No. 146, paragraph 127, 128.
[992] Nigel Bankes, *The protection of the rights of indigenous peoples to territory through the property rights provisions of international regional human rights instruments*, Draft January 2011, pp. 41-54.
[993] Nigel Bankes, *The protection of the rights of indigenous peoples to territory through the property rights provisions of international regional human rights instruments*, Draft January 2011, pp. 41-54.

Recapitulation: The Inter-American System of Property Rights this Far

In the judgments and decisions discussed, the Inter-American Court and Commission have progressively interpreted the right to property to encompass collective land rights for indigenous communities. Although the Court elaborates on the justification and content of property rights for indigenous peoples and stresses that their participation is an essential requirement for implementation, there are two main areas that were not sufficiently dealt with. First, there is the question of how wide the scope of participation, consultation, and FPIC requirements is. Secondly, if indigenous peoples have property rights over their lands, what would be the exact implications for competences to use the natural resources that are to be found on and in those lands?

Participation and natural resource rights have been dealt with in the context of the Saramaka decision, which will be dealt with next and which enhanced the Courts system of indigenous land rights considerably. However, it may be a good idea to first recapitulate the system so far.

Awas Tingni proved to be the starting point for granting indigenous peoples control over their lands. The Court held to its reasoning that indigenous peoples have a special spiritual tie to their traditional territories and that therefore these territories require special protection. It also explained that possession of the land should suffice for proving the existence of a proprietary interest in the land. To effectuate this right, the State has the duty to carry out the *delimitation, demarcation, and titling* of the indigenous lands involved *with full participation by the Community* and take into account its *customary law, values, customs and mores.*"[994]

The Commission explained in the *Dann* and *Maya* decisions that the determination of the extent to which indigenous peoples have traditional title to their lands is based upon a process of:

> fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.[995]

The Commission explained that communal property rights and self-determination *require* strong participatory rights and FPIC to become effective.
In *Moiwana*, the Court explained that these rights may also exist when an indigenous community no longer possesses their traditional lands and explained that effective - legal, administrative, and other - mechanisms for the delimitation, demarcation, and titling are needed to secure the traditional lands of the community. Furthermore, the Court declared that the state should

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[994] IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of August 31, 2001, Int.-Am. Ct. H.R., (Ser. C) No. 79, paragraph 164. Emphasis added.
[995] IACHR, Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Int-Am. C.H.R., (2001), December 27, 2002, paragraph 140. Emphasis added.

implement these mechanisms with the participation, and informed consent of the community, expressed through their representatives.

The *Yakye Axa* and *Sawhoyamaxa* cases also dealt with communities that no longer possessed their ancestral lands, but in these cases title had been legitimately transferred to third parties. The Court decided that there is indeed a right to restitution of traditional territories and that this right may outweigh private property rights. Nevertheless, the right to property is not absolute and may be restricted if those restrictions are: established by law, necessary, proportional, and have the aim of attaining a legitimate goal in a democratic society.

The duties of the state to implement this scheme are consistently described in both negative and positive ways. The State must refrain from alienating indigenous lands, but at the same time it must delimit, demarcate, and title indigenous territories. This may involve restitution of land, which was lost without the community's *consent*.[996]

With the basic rationale for granting indigenous peoples collective property rights over their lands in place, it is now time to explore the Saramaka case. This case has significantly enhanced the land rights system mentioned above and became a starting point for an elaborate explanation of FPIC. For this reason, the Saramaka case will be contextualized and explored in more detail.

V.1.2.4 The Key Decision: An In-depth Investigation of Saramaka People v. Suriname

The Saramaka case will be explored against the background of the situation of the indigenous and Maroon peoples of Suriname to explain the possibilities and pitfalls that arise in the implementation of indigenous land, resource, and participation rights. By contextualizing the Saramaka People versus Suriname decision, it will be possible to expose a variety of legal issues relevant to FPIC. A detailed examination of Saramaka will also illustrate which mechanisms – within and beyond the Inter-American human rights system – are available to effectuate regional judicial decisions.

Amongst others, the Surinamese case touches on resource and development rights, integration of environmental law in FPIC processes, property rights, relocation, legal recognition, and sustainability. In this case, most issues that arose in the preceding judgments are covered, and, importantly, its aftermath clearly illustrates the problems that arise with regard to the implementation of FPIC and land rights. Issues discussed earlier in relation to representation, misinformation, and "prior consent" are present as well. Furthermore, *Saramaka* expands the Court's system and formed the upshot for a number of detailed studies into rights to free, prior and informed consultation and consent.

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[996] When the resettlement or relocation of indigenous peoples is involved, FPIC has a mandatory character, as will be explained in the conclusions to this paragraph.

V.1.2.4.1 Suriname: Maroon and Indigenous Communities

Suriname has a particularly dynamic history. Being colonized by the Dutch (amongst others) led to a number of different waves of immigrants. Apart from Africans being brought over to the colony as slaves, large groups of people from India, Indonesia (Java) and China now live in Suriname. Moreover, there are considerable groups of Brazilian, Lebanese and Jewish people.

The original inhabitants of Suriname were different Amazonian and Caribbean tribes, which now make up about 3,7% of the population. The four most numerous of the different tribes are the Kaliña (or Caribs), the Lokono (or Arawaks), the Trio and the Wayana people. Kaliña and Lokono natives live mainly in the northern part of Suriname and are sometimes referred to as 'lowlands' natives, while the Trio, Wayana and a number of other Amazonian tribes live in the south and are referred to as "highland" indigenous peoples.[997]

Apart from the indigenous peoples, Suriname also harbors a large group of tribal people known as the Maroons (from the Spanish word Cimarron). These are descendants of Africans who fled the Dutch slave-plantations and continued their distinctive identity based on their West African origins. They now make up about 14,7 % of the Surinamese population. This entails that almost 20% of the Surinamese population qualifies as tribal or indigenous.

The Maroons of Suriname are organized in six groups, consisting of two main branches. The Eastern Maroons consist of the N'Djuka (or Aukaners), the Aluku (or Boni) and the Paramaka people. The central group of Maroons consists of the Sarmaka, the Matawai and the Kwinti.

The N'Djuka and Saramaka tribes are the most numerous and number between 15.000 and 20.000 each. Most of the Maroons speak either N'Djuka or Saramakan language.[998]

The Maroons are organized in different clans (lö's), and represented by Captains and head-Captains (Kapiteins). At the head of each Maroon people is a Gaa'man, who is the highest authority. Apart from this traditional structure, there are different organizations that represent the Maroon people. For the Saramaka people, the VSG (Vereniging Saramakaanse Gezagsdragers) unites the different captains and representatives.

Social organization of the different indigenous peoples of Suriname is more diffuse, considering their more diverse nature. The indigenous villages are also represented by Captains and Basja's (Captain's assistants). Since, as was discussed above, there is no official legal recognition of indigenous and tribal peoples in Suriname, they have to rely on other forms of legal personality to protect their interests. The VIDS (Vereniging Inheemse Dorpshoofden Suriname), which

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997 Ooft M, 'IWGIA 2012 yearbook update article on Suriname', Policy Officer at the Bureau of the Association of Indigenous Village Leaders in Suriname (Vereniging van Inheemse Dorpshoofden in Suriname, VIDS), www.iwgia.org, consulted August, 2012.

998 Minority Rights Group International, World Directory of Minorities and Indigenous Peoples, Maroons, Update June 2008.
http://www.minorityrights.org/5154/suriname/maroons.html, consulted August 2012.

comprises all the different Captains of the indigenous villages - and the formal legal person the Buro VIDS - represent the different indigenous communities in Suriname. Apart from the VIDS, there are a number of organizations that represent Suriname's indigenous peoples.[999] Furthermore, a number of non-governmental organizations assist indigenous and Maroon peoples in their struggles for control over traditional lands.[1000]

In 2006, during a Grankrutu - an important meeting - of indigenous and Maroon representatives in Diitabiki - or: Drietabbetje, the capital of the Aukaner Maroons- it was decided that indigenous and Maroon peoples would join hands to win legal recognition of their land rights. Furthermore, the adopted resolution proclaimed that indigenous peoples would be involved and have a say in decisions concerning the granting of concessions. The cooperation of indigenous and Maroon peoples is meant to solve the land rights issue in Suriname through cooperation and the formulation of a joint position.[1001]

Even though indigenous and Maroon peoples are well organized and make up almost one fifth of the Surinamese population, their socio-economic situation remain troublesome.

V.1.2.4.2 Contemporary Problems and Land Protection in Surinamese Law

Currently, the indigenous and tribal peoples of Suriname are troubled by different activities that endanger their traditional lands. The infrastructure in the interior of Suriname is being improved, but this is mostly in order to extract the valuable resources that are to be found there. Apart from the "legal" extraction of gold, oil, and other resources, big problems arise in relation to illegal logging and most importantly, gold mining.

Small-scale illegal gold mining is conducted with the use of mercury, which is detrimental to the health of the people living in proximity of the mining sites. Mercury poisons the waterways and consequently the fish on which the indigenous and maroon people are dependent for their subsistence. Moreover, the "gold rush" also leads to a number of social problems, since it attracts different groups of illegal gold miners, mainly from Brazil.[1002]

Legal protection for the lands and resources of the indigenous and tribal peoples in the interior is needed but Suriname's legal framework does not recognize these peoples and there is no legislation in place that effectively protects the endangered communities. Suriname has no constitutional recognition of its indigenous and tribal peoples and no specific laws exist on

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[999] E.g. The Organisatie Samenwerkende Inheemse Dorpen Para (OSIP), The Organisatie van Kaliña en Lokono in Marowijne (CLIM) and the Organisatie van Inheemsen in Suriname (OIS).

[1000] Most importantly, the UK based NGO Forest Peoples Programme (FPP), http://www.forestpeoples.org/.

[1001] Diitabiki Resolution, 2006, English translation. Available upon request.

[1002] Remember the recent allegations of killings among Yanomami Indians in Venezuela by illegal Brazilian gold miners.

their rights. This gives Suriname a unique position in the region. The state, however, argued in Saramaka People v. Suriname, that its legal framework was sufficient to protect indigenous and tribal communities. While the Saramaka case will be discussed at length in the following paragraph, we will now discuss the Surinamese legal framework, especially those laws of which the state argued that they protect the land rights of the Maroons.

The state argued that: "although it may be correct that land related interests of the Saramaka are not recognized as a subjective right in the Suriname legal system, it is a tendentious misrepresentation to suggest that legitimate interests of the Tribe are not recognized by the system and respected in practice."[1003] The representatives of Suriname stated that their domestic laws did recognize certain interest of member of indigenous and tribal peoples to land and argued that foremost the 1987 Constitution, the L-1 Decrees of 1982, the Mining Decree of 1986, and the Forest Management Act of 1992 effectively protected indigenous land rights in practice.[1004]

The Court had to analyze to which extent these legal provisions recognized an interest in the land, while noting from the outset that an "interest" does not satisfy the State's obligations under Article 2 of the Convention with regards to Article 21.[1005]

The *Constitution of 1987* does not explicitly recognize communal property rights for indigenous or tribal communities. While Suriname is not the only country in the region where such provisions are absent, the Court noted that obligations to recognize collective property systems does not necessarily require constitutional provisions.[1006] The Court explained that: "Article 2 of the Convention requires States to give domestic legal effect to those rights and freedoms by 'such legislative or other measures as may be necessary.' In the case of Suriname, no such legislative or other measures have been adopted."[1007]

In the *L-1 Decree of 1982* on land policy some interest of tribal communities in the land is recognized. However, in its explanatory note it is stated that tribal communities may have *de facto* rights, which are to be distinguished from "real" *de jure* rights, which are issued by the state to individuals.[1008] The Court explained that this constitutes a limitation on the recognition of legal right for

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[1003] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 106.
[1004] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 106.
[1005] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 106.
[1006] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 107.
[1007] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 107.
[1008] See: Decree L-1 of June 15, 1982, containing basic principles concerning Land Policy, SB 1982, no. 10, Article 4.

the Maroons in Suriname, and was therefore also incompatible with the obligations under Article 2 and 21 of the American Convention.[1009]

The *1986 Mining Decree* similarly fails to give domestic legal effect to property rights that the Maroons have as a result of their communal property system, where it only recognizes a right to compensation to rightful claimants with an interest on land on which mining rights are granted.[1010] The Decree, however, defines claimants as "persons who have a real property or personal property right on private lands." Therefore, a claimant or third party needs to prove it has a registered title or title issues by the State. Instead of protecting Maroon communal property, as the State argued, the Mining Decree requires that they first acquire a formal title to their lands before any compensation would be possible.[1011]

The state also referred to the *1992 Forest Management Act* as an example of domestic legislation that gives legal effect to the rights of the members of the Saramaka people to enjoy their communal property, since said law makes it possible for the state to grant permits for "community forests."[1012] Such permits, however, are not issued as a right but at the sole discretion of the Minister in charge of forest management. The Court explained that this does not suffice, since: "the 'community forests' permits are essentially revocable forestry concessions that convey limited and restricted use rights, and are therefore an inadequate recognition of the Saramakas' property rights. Likewise, since the laws required to issue community forests have yet to be adopted, the legal certainty of said title may be called into question."[1013]

The Court also noted the ambiguous nature of the wording in the Act that: "customary rights of tribal inhabitants, with respect to their villages and settlements, as well as their agricultural plots, will be respected as much as possible." This fails to take into account the special and all-encompassing relationship that indigenous peoples have with their territory as a whole, not just with their settlements or agricultural plots.[1014] The Court explained that the State's duty is much higher than this for adequately respecting Maroon or indigenous communal property structures.

All in all, these different provisions do not adequately recognize the collective property rights of indigenous and Maroon peoples in Suriname. The

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[1009] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 108.
[1010] See: Decree E 58 of May 8, 1986, containing general rules for exploration and exploitation of minerals (Mining Decree), Articles 47 and 48.
[1011] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 111.
[1012] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 112.
[1013] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 113.
[1014] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 114.

Court stated that merely granting a "privilege to use the land" falls short of the requirements of the Convention.

In summary, Surinamese law does not offer explicit recognition to indigenous and tribal communities. This is different from other countries in the region, most of them offer – at least to some extent – constitutional or other legal recognitions of indigenous peoples and collective land rights. Furthermore, the legal provisions that do exist in Surinamese law are inadequate to effectively protect the special interests that indigenous and tribal peoples have. What is required under the Convention and international law has been discussed above - the earlier cases of the Court and Commission - and will be discussed at length in the following paragraph, in which the Saramaka decision is further analyzed and explained.

V.1.2.4.3 Controversy over Land and Resource Rights before the Inter-American Court of Human Rights: Saramaka People v. Suriname

In June 2006, the Commission submitted its application against the State of Suriname to the Court. The application originated from petition No. 12.338 which was presented to the Commission in October 2000, on behalf of the Association of Saramaka Authorities and twelve Saramaka Captains, as well as on behalf of the Saramaka People of the Upper Suriname River.[1015]

The Saramakas are one of the six Maroon tribal peoples that inhabit the forests of Suriname.[1016] As has been explained, Maroons are the descendants of Africans who were brought to Suriname by the colonial powers. They are next generations of escaped slaves who won their freedom - from the Dutch - in the 18th Century. Their freedom and autonomy were recognized in treaties concluded with the Dutch and through more than two hundred years of colonial administrative practice.[1017]

The Saramaka People are not indigenous to Suriname, that is, they did not form a society there at the time of colonization. Thus, one of the questions for the Court to consider was if the Saramaka tribal people were subject to the same special protection as indigenous peoples.

The Saramaka people are organized in twelve matrilineal clans (*lös*), and it is estimated that the contemporary size of the Saramaka population ranges from 25,000 to 34,000 people.[1018] These are divided into 63 communities on the Upper Suriname River and in a number of displaced communities located near

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[1015] *Ibid*., paragraph 1.

[1016] As mentioned the other five Maroon peoples are: the Aucaner, the Paramaka, the Aluku, the Kwinti and the Matawai People. Together they form a population of approximately 60.000 individuals. Suriname is also home to four main groups of indigenous peoples: the Kalinya, Lokono, Trio and Wayana People. They number about 20.000 individuals. The Indigenous and Tribal Peoples of Suriname comprise about 20 percent of the total population.

[1017] Forest Peoples Programme and Association of Saramaka Authorities, *Free, Prior and Informed Consent: Two Cases from Suriname*, 2007, page 2.

[1018] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 80.

said area.[1019] The social structure of Maroons in general and the Saramaka people in particular is different from other sectors of society. As explained above, the Saramaka people are organized in matrilineal clans and they govern themselves, at least partially, by their own customs and traditions. The different *lö* recognize the political authority of the local leaders, including what they call Captains and Head Captains, as well as the Gaa'man, who is the clan's highest official.[1020]

The Court further examined the meaning of land for the Saramaka community. It ascertained that land is more than merely a source of subsistence for them since it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people.[1021] This special relation was described by Head Captain Wazen Eduards during the public hearings as follows:

> The forest is like our market place; it is where we get our medicines, our medicinal plants. It is where we hunt to have meat to eat. The forest is truly our entire life. When our ancestors fled into the forest they did not carry anything with them. They learned how to live, what plants to eat, how to deal with subsistence needs once they got to the forest. It is our whole life.[1022]

However, after the end of the "war of the interior" there were new challenges to the Saramaka Maroons. The government had issued a number of concessions for timber extraction to amongst others Chinese logging companies in the mid-1990s. The Saramakas had not consented to these activities, and were not even consulted or informed about these concessions. As a matter of fact, they only found out about the concessions when they found loggers already employed on their lands. When national remedies failed, the Saramakas filed a petition to the Commission in 2000. The Commission referred the case to the Court in 2006.[1023]

The applicants alleged that Suriname had failed to recognize their land rights, which resulted in violations of Article 21 (the right to property) and Article 25 (the right to judicial protection) of the American Convention on Human Rights, in particular regarding development projects and investment activities in the area inhabited by the Saramaka. The Saramaka also filed complaints about the construction of the Afobaka dam in the sixties, which had resulted in the displacements of a large number of Saramaka communities.

[1019] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 80.
[1020] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 81.
[1021] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 82.
[1022] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), par. 82.
[1023] Organization of American States, Inter-American Commission on Human Rights, Application to the Inter-American Court of Human Rights in the case of 12 Saramaka Clans, (Case 12.338) against the Republic of Suriname, 23 June 2006.

However, the Court declared the complaint regarding the continuous effects related to the construction of the dam inadmissible on grounds of legal certainty, since these facts and allegations were not contained in the original application to the Commission or Court.[1024]

The Court first had to deal with a lengthy set of preliminary procedural objections by the State, concerning the lack of legal standing before the Commission and the Court,[1025] irregularities in the proceedings before the Commission,[1026] non-compliance with time-limits,[1027] non-exhaustion of domestic legal remedies,[1028] duplication of international proceedings,[1029] and lack of jurisdiction "*ratione temporis*."[1030]

After rejecting these objections, the Court formulated eight issues which it would address.[1031] First, whether the Saramaka People make up a tribal community, second, whether Article 21 of the Convention also protects tribal peoples, third, whether Suriname recognizes the communal property right of the Saramaka, fourth, to what extent the Saramaka are entitled to enjoy their natural resources, fifth, whether the State may grant concessions for extracting these resources, sixth, whether the current concessions are in line with the safeguards under international law, seventh, whether the lack of recognition of the Saramaka people as possessing juridical personality makes them ineligible to receive communal land title under domestic law, and finally, whether there are effective legal remedies in domestic law for the Saramaka People.[1032] The parts of the judgment most relevant for this study will be summarized below.

In light of what was explained above about the make-up of Saramaka society, the Court had little trouble to explain that the Saramakas make up a tribal people. The Court already recognized that N'Djuka Maroons formed a tribal society in the *Moiwana* case. Although the Saramakas could not be seen as "indigenous" or "first inhabitants," the Court asserted that they are subject to the same protection, since they make up a tribal community:[1033]

1024 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 15, 16 and 17. This could be explained by the fact that the Moiwana Case, in which the continuing violation doctrine was explained, was not decided by the time the Saramakas filed their petition.

1025 *Ibid*., paragraph 19 and 25.

1026 *Ibid*., paragraph 30.

1027 *Ibid*., paragraph 34.

1028 *Ibid*., paragraph 41.

1029 *Ibid*., paragraph 45.

1030 *Ibid*., paragraph 59.

1031 Also see: F Mackay F, *Saramaka, de Strijd om het Bos* (KIT Publishers, 2010).

1032 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 77.

1033 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 84: The Court assessed that the members of the Saramaka People, although not indigenous to the region they inhabit, make up a tribal community: *"Whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms customs and/or traditions."* One

> Whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms customs and/or traditions.[1034]

The reasoning of the Court has implications wider than only in this case, since it affirms that tribal communities in the OAS region are indeed subject to the same protection as "real" indigenous peoples.[1035]

Subsequently, the Court stated that the right to property is also applicable to tribal peoples, who, like indigenous peoples, deserve special protection under international law, since both groups share distinct characteristics, amongst others regarding the special relation these peoples have with their lands, which requires special measures under international human rights law.[1036] This special relation and subsequent conception of communal ownership is considered in detail by the Court in its analysis of the customary land use pattern of the Saramaka People.[1037]

As examined above, the *communal land doctrine* was developed by the Court in the Awas Tingni case, and reiterated and expanded in subsequent cases and decisions. The Court concluded that the Saramaka communal land rights are included in the American Convention's provision on the right to property. Furthermore the Court stressed that this was interpreted in conformity with ILO Convention No. 169 and the 1966 UN Human Rights Covenants: the ICCPR and ICSECR. In this light, the Court expressly quoted the right to self-determination as being applicable to indigenous and tribal peoples.[1038] The IACtHR distilled the relevant norms from the broader body of international law and stated that although Suriname had not ratified ILO 169, it was party to a number of other international instruments protecting human rights.[1039]

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could wonder whether the 'continuing violation doctrine' would apply to the afobaka case as well.

[1034] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 84.

[1035] Mackay F, *Saramaka, de Strijd om het Bos* (KIT Publishers, 2010), p. 27.

[1036] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 86. The Court also referred to the Moiwana case, where another Maroon community was granted the same special protection as Indigenous Peoples were. See: IACtHR, Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paragraph 132 and 133.

[1037] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), mainly paragraphs 77 – 101.

[1038] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 93. The Court referred to the right to self-determination of indigenous and tribal peoples as recognised by the Committee on Economic, Social and Cultural Rights. See: E/C.12/1/Add.94 of December 12, 2003.

[1039] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraphs 97 -107. *Also see,* Orellana M A, 'Saramaka

Regarding the important issue of *natural resources* the Court determined that members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory since: "Without them, the very survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people."[1040] The Court considered the community's land rights, in addition to a necessity for *physical survival*, as essential for the *cultural and spiritual survival* of distinct peoples. Therefore, Article 21 of the IACHR protects those resources that are traditionally used by the Saramaka people. The Court explained:

> From this analysis, it follows that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.[1041]

The Court explained, in relation to gold mining concessions, that although these may not be qualified as 'traditionally used resources' the extraction of those will unquestionably affect other natural resources, which are necessary for the Saramaka's survival.

Furthermore, the Court emphasized the importance of having *collective juridical capacity* as a precondition for effective participation and the exercise of the collective right to property and expands its reasoning and applicable remedies in relation to the property rights of indigenous communities.

Nevertheless, the Court also assessed that Article 21 (the right to property) should not be interpreted in such a way that it prevents the state from issuing any type of concession for the exploration and extraction of natural resources on Saramaka territory. The Court noted that the protection of the right to property is not absolute and could be restricted in the interest of society as a whole.[1042] In elaborating on this the Court stated that:

> That is, under Article 21 of the Convention, the State may restrict the Saramaka's right to use and enjoy their traditionally owned lands and natural resources only when such restriction complies with the

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People v. Suriname', American Journal of International Law, 102, 2008, p. 3. Orellana states that the Court, in considering that Suriname had not ratified ILO Convention No. 169 and its legislation did not recognise a right to communal property, utilized systemic interpretation techniques (analysing the matter in light of articles 1 and 27 of the ICCPR) to overcome this hurdle.

[1040] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 121, drawing on the Yakye Axa Case.

[1041] *Ibid*., paragraph 122.

[1042] *Ibid*., paragraph 126 and 127.

> aforementioned requirements[1043] and, additionally, when it does not deny their survival as a tribal people.[1044]

The Saramaka Criteria: Expanding the System of Collective Property Rights

This brings us to the most significant part of the Saramaka judgment. In ensuring that this "denial of survival as a people" does not take place, the Court developed three criteria, which are directly related to FPIC and will be dealt with at some length below.

First, the State must ensure the *effective participation* of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development or investment plan.[1045] Secondly, the State must guarantee a *reasonable benefit* for the Saramaka people from any such plan within their territory. Third, the State must ensure that no concession is issued until and unless independent and technically capable entities, with the State's supervision, perform a *prior environmental and social impact assessment*.[1046]

Remarkably, in developing this rather innovative doctrine on indigenous peoples' land rights, the Court follows, to a large extent, the findings and conclusions of José Martinéz Cobo, as enshrined in his 1983 conclusions. Cobo had already affirmed that the natural resources of indigenous lands were entirely the property of the indigenous communities, and only they should be competent to make decisions regarding the manner and scale of exploitation of these resources.[1047]

Cobo concluded that full participation of indigenous communities was exceptionally important in relation to the granting of exploration and exploitation licenses,[1048] which appears to coincide with the first criterion the developed by the Court. Subsequently, since participation is also essential in relation to the profits generated by such operations, a fair share of the revenue should be obtained by the indigenous communities affected, and they should fully share in mining royalties. Here, the Court's requirement of benefit sharing can clearly be distinguished.

[1043] *Ibid.*, paragraph 127: The restrictions have to be: Previously established by law, necessary, proportional and with the aim of achieving a legitimate objective in a democratic society.
[1044] *Ibid.*, paragraph 128.
[1045] *Ibid.*, paragraph 129, footnote 127: By "development or investment plan" the Court means any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka People, particularly any proposal to grant logging or mining concessions.
[1046] *Ibid.,* paragraph 129.
[1047] José Martinéz Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8, page 70, at 542.
[1048] José Martínez Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8, page 71, at 543.

Finally, in Cobo's findings it is stated that full participation in the procedures determining the damage caused by resource exploitation is invaluable,[1049] and that the environmental impact of the exploitation should be "seriously and urgently investigated."[1050] Moreover, Cobo concluded that the indigenous populations concerned should be granted enough time to fully understand any past or future consequences of mining or prospecting licenses and activities that affect their natural resources so that they can "establish the means and procedures necessary to protect their interests."[1051]

According to the conclusions, the protection and preservation of indigenous lands from exploitation by multinational corporations, "without the *explicit consent* of the communities concerned," should be guaranteed.[1052] Without explicitly noting the Cobo conclusions, the Court appeared to recognize and adhere to the very recommendations imposed in the Cobo proposals and recommendations in relation to the "special area of action," i.e. indigenous peoples' land rights.[1053] The Court constructs its safeguards for exploitation of indigenous lands and resources along remarkably similar lines of those proposed in the system of requirements in the 1983 Cobo report.

The safeguards of prior social and environmental impact assessments and benefit sharing can also be distinguished in the "elements of common understanding" of the UNPFII 2005 Workshop on Free, Prior and Informed Consent and in the World Bank policy on Indigenous Peoples.[1054]

The Court also regarded these safeguards – in particular the first two on effective participation and benefit sharing – in accordance with the observations of the Human Rights Committee and the practice in several States Parties to the Convention. Furthermore, for our purposes most importantly, these safeguards were regarded as consistent with the text of several international instruments. The Court explicitly mentioned the UN Declaration on the Rights of Indigenous Peoples and quoted Article 32:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

[1049] *Ibid*., page 71, at 543.
[1050] *Ibid*., page 72, at 554.
[1051] *Ibid*., page 71, at 545/546.
[1052] *Ibid*., page 71, at 547.
[1053] José Martínez Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8, third part, XXII proposals and recommendations, K, special areas of action, paragraph 509-574.
[1054] See E/C.19/2005/3, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 17 February 2005, presented at the Fourth session of the United Nations Permanent Forum on Indigenous Issues, New York, 16–27 May 2005.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources**, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[1055]

The citation of the UN Declaration marks the first time this instrument has been referred to, after its adoption, in an international human rights judicial body.[1056] Possibly, the Court assumed that some parts of the Declaration acquired the status of international customary norms.

Free, Prior and Informed Consent in the Saramaka Case

Subsequently, the Court elaborated on the concept of free, prior and informed consent. First, the Court stated that in ensuring effective participation of the Saramaka people, the State has a duty to actively consult with the community in a way that corresponds with their customs and traditions. Effective participation thus includes requirements of consultation and consent. It requires the State to accept and disseminate information, and entails a constant communication between the parties in *good faith*, through culturally appropriate procedures, and with the *objective* of reaching an agreement.[1057]

The element of "prior" is elaborated upon by the court as well whereas the Court noticed that the Saramakas must be consulted at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community. According to the Court, early notice offers time for internal discussion within communities and the opportunity to provide feedback to the State, which has a duty to ensure that members of the Saramaka are aware of the possible risks involved.[1058]

[1055] United Nations Declaration on the Rights of Indigenous Peoples, UN A/RES/61/295, Article 32. Emphasis is mine. Cited in: IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 131. Later on it will be explained that the OAS entities distinguish between a right to consultation, for which FPIC is to be the purpose, and three situations in which FPIC is mandatory.

[1056] In a press release, following the UNPFII seventh session, the Forum states: "The Forum welcomed, in the document, the ruling of the Inter-American Court of Human Rights in the case of Saramaka People vs. Suriname (28 November 2007), in which the Declaration had been invoked to settle a logging case."

[1057] Case of the Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 133.

[1058] *Ibid*., paragraph 133.

The Court stressed the importance of taking into account traditional ways of decision-making and reaffirmed the criterion developed in the Belize Report that a process of fully informed consent entails at a minimum:

> That all of the members are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.[1059]

Apart from reaffirming the consent criterion as stated in the Belize and Dann Reports by the Commission, the Court further explained the concept in paragraph 134, cited here in full:

> Additionally, the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State **has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions**. The Court considers that the difference between "consultation" and "consent" in this context requires further analysis.[1060]

Regarding large-scale development projects, the state has a duty to obtain consent of the community whose territory is affected. In recognizing that the difference between consultation and consent requires further analysis, the Court not only illustrated a problem that needs to be solved in possible future cases, but also implicitly affirmed that "consent" and "consultation" are legally speaking two different concepts, which would be in line with the requirements posed by the Court in relation to development projects.

This paragraph, in which the Court acknowledged that the scope of FPIC is not clear as of yet, provided a kick-start for discussions and studies on the range of FPIC processes. These will be discussed in the following paragraphs, where it will be shown that within the Inter-American System, there is a both a distinction and overlap between a *right to* free, prior and informed consultation and a stronger *requirement of* free, prior and informed consent. Remarkably, the Court did not qualify the impact of the logging activities on Saramaka territory, and therefore left open the question whether consultation – with the goal to achieve FPIC – would be sufficient or that the stronger duty to obtain FPIC was present in this case.

[1059] *Ibid*., paragraph 133, citing the Belize Report in note 133.

[1060] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 133. Emphasis added. Here the Court mentions the third situation in which FPIC is mandatory, in addition to situations where indigenous peoples are relocated or when hazardous materials are stored within their territories.

The Court enforced its general argumentation by stating that the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People had similarly observed that:

> Wherever large-scale projects occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. […] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.[1061]

Subsequently, the UN Special Rapporteur stated that free, prior and informed consent is essential for the protection of human rights of indigenous peoples with regard to large-scale development projects.[1062]

In relation to the second criterion, that of benefit-sharing, the Court again referred to the UN Declaration and determined that this concept is inherent to paragraph 2 of Article 21 of the American Convention on compensation.[1063] Apart from developing criteria for the scope of FPIC, the Court also dictates the circumstances necessary to implement its regime in the, noticeably far-reaching, remedial measures it imposes on the State of Suriname in its judgment.

The Court assessed violations of the property right of the Saramaka People regarding prior concessions granted by the State. The Court first observed that the members of the Saramaka people have a right to enjoy and use their natural resources. The logging concessions were found to interfere with the traditional economic activities of the community and therefore threatened the resources necessary for the Saramaka's survival as a people. The Court observed that none of the three safeguard criteria were applied, which had also resulted in environmental damage.[1064] The integration of environmental requirements in FPIC processes is a novel approach, which may both strengthen the legal position of indigenous peoples, as well as broaden the scope for sustainability-demands. In the next paragraph, the implementation-procedures for such integrated FPIC processes will be examined more closely.

However, before summarizing the remedies on which the Court decided, its opinion on the recognition of the Saramaka people's juridical personality will

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1061 *Ibid*., paragraph 135, citing *UN, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, supra* note 97, p. 2.
1062 *Ibid*., paragraph 135.
1063 *Ibid*., paragraph 138. The difference between 'compensation' and 'benefit-sharing' requires further analysis.
1064 *Ibid*., paragraph 147 – 158.

be briefly mentioned. For our purposes it is enough to say that the Court assessed that since the members of the Saramaka people form a distinct tribal community in a situation of vulnerability, the state must establish the judicial and administrative conditions necessary for the Saramaka people to collectively enjoy the right to property, in consultation with the Saramaka people and respectful of their traditions and customs. The state's failure to do so resulted in a violation of their right to the recognition of their juridical personality pursuant to Article 3 of the American Convention in relation to their right to property, protected under Article 21 of the Convention.[1065] As mentioned above, the state argued that its domestic legal system offered enough opportunities for tribal groups to protect their lands, but the Court disagreed.[1066]

The way in which legal personality could be exercised is: "A question that must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the state or this Court in this particular case."[1067] Recognition of legal personality is indeed essential to enable indigenous and tribal peoples to exercise all their rights.[1068] The Court emphasized that this is one of the special measures to which indigenous and tribal peoples are entitled under international law.

Remedies

The remedies that the Court offered reflect the developments in its system on participation, communal property, and FPIC. The Court directed the state to begin within three months and complete within three years: to delimit, demarcate, and grant collective title over the territory of the Saramaka in accordance with their customary laws through prior, effective, and informed consultations with the Saramakas.[1069]

1065 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 174 and 175. As was discussed earlier, Surinamese law does not recognize indigenous or tribal peoples, thereby creating large problems in relation to representation.

1066 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 115: "The Court has previously held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighboring peoples. In this regard, the Court has previously declared that "a strictly juridical or abstract recognition of indigenous lands, territories or resources lacks true meaning where the property has not been physically established and delimited."

1067 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 164.

1068 Mackay F, *Saramaka, de Strijd om het Bos* (KIT Publishers, 2010), p. 38.

1069 IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 193. Next to the requirements of delimitation,

The Court confirmed and brought into practice its system of granting territorial rights to indigenous (or in this case, tribal) peoples through recognizing a communal property right under Article 21 of the American Convention. Until this delimitation, demarcation and titling has been carried out, Suriname must abstain from activities that affect the existence, value, use, or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, prior and informed consent of the Saramaka people.[1070] Once again, an analogy with the Cobo conclusions is present. Cobo indicated that since it is the indigenous community concerned that will suffer most of the consequences, projects should be suspended until proper negotiations have taken place.[1071]

Furthermore, prior concessions have to be reviewed and evaluated to see if they need to be modified.[1072] As was discussed in Part III of this study, the "prior" requirement may demand ex-post revision of existing arrangements. The Court also decided that legal recognition must be given to the Saramaka people, since their juridical capacity is necessary to ensure the full exercise and enjoyment of their communal right to property. Moreover, procedures have to be implemented in national legislation to ensure free, prior and informed consultation and consent, to guarantee equitable benefit sharing and to ensure that environmental and social impact assessments are conducted by independent and technically capable entities.[1073]

The Court specified criteria for the scope and implementation of communal land rights for indigenous (and tribal) peoples and obliged the State to take far-reaching measures in order to remedy the current situation. Furthermore, for the first time the Court awarded a monetary compensation on the basis of environmental damage resulting from the State's violation of the relevant provisions of the American Convention.[1074]

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demarcation and titling of indigenous territory, the Court ordered Suriname to: (a) amend its legislation impeding the exercise of the right to property, through fully informed, prior, and effective consultations with the Saramaka people, (b) grant the Saramakas legal recognition of their collective juridical capacity, (c) perform prior environmental and social impact assessments before awarding any concession for any development or investment project within Saramaka territory, (d) finance radio broadcasts and newspaper issues on the verdict and (e) compensate material and non-material damages, to be allocated in a development fund for the benefit of the community as a whole.

[1070] *Ibid*., paragraph 193.

[1071] José Martínez Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, E/CN.4/Sub.2/1983/21/Add.8, page 71, at 545.

[1072] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 193.

[1073] *Ibid*., paragraph 193.

[1074] *Ibid.,* paragraph 198 – 213.

Conclusions from the Saramaka Case this far

The Saramaka case offers the most comprehensive account of the scope of FPIC this far. *Saramaka People v. Suriname* expands the Court's system of communal property rights that was explained above, and clarifies what a system of effective participation should include. While it was already discussed that restrictions on the right to property must be (a) previously established by law, (b) necessary, (c) proportionate, and (d) with the aim of achieving a legitimate objective in a democratic society, the Court added another "factor" to these requirements. When restricting the property rights of indigenous or tribal communities, it must be considered whether the proposed action amounts to a denial of the concerned communities' traditions and customs in such a way that it endangers their – physical or cultural – *survival*.

To make sure that this does not happen, the Court developed its three-part test. First, the *effective participation* of the members of the people concerned must be ensured, which implies – at a minimum – good faith consultations with the purpose of achieving free, prior and informed consent. Secondly, a *reasonable benefit* from the proposed plan must be guaranteed, and thirdly, prior *environmental and social impact assessments* must have been realized. Additionally, the Court explained that obtaining FPIC becomes mandatory when development projects have a *major impact* on indigenous communities.

the Court explicitly linked the principle of FPIC to the UN Declaration on the Rights of Indigenous Peoples. The pieces of the puzzle seem to come together in this landmark decision. The doctrine of communal land rights, in combination with the principle of self-determination of peoples, create a form of territoriality for indigenous peoples in which the Court tries to delineate the scope for FPIC.

Later on in the conclusions to these paragraphs, the full system of the court will be reiterated, but first it is necessary to have a look at what happened in the aftermath of the 2007 Saramaka decision, since a number of questions about this system of effective participation and land/resource rights remained open. This discussion is divided in two different paragraphs, one specifically on the implementation of the Saramaka judgment, and one on further legal developments in the period after the judgment. However, some overlap between them is inevitable.

V.1.2.4.4 Implementation of FPIC and International Judgments in Suriname

As discussed earlier, implementation of the judgments of the Inter-American Court has not been without delays, to say the least. Saramaka is no exception. But while the Awas Tingni, Sawhoyamaxa, and Yakye Axa cases have largely

been concluded, the most important requirements of the Saramaka judgment still have to be satisfied.[1075]

The Court uses monitoring reports to measure and expose the way in which the state complies with its judgments. Furthermore, the state may request an interpretation of the judgment from the Court if certain parts are unclear. Both follow-up mechanisms were used after the Saramaka judgment. Furthermore, the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, visited Suriname and offered his technical expertise to help the state with the implementation of the verdict. Moreover, representatives of the Saramaka people also requested the Committee on the Elimination of all forms of Racial Discrimination (CERD) to consider their complaint (about the lack of implementation of the Saramaka judgment) under its Urgent Action and Early Warning Procedures. CERD also commented upon the judgment's follow-up in its 2009 consideration of Suriname's country report. The relevant reports, statements and documents will be discussed next.[1076]

Interpretation of the Saramaka Judgment

In 2008, Suriname requested the Court for an *interpretation of its judgment*. On August 12, the Court issued its interpretation judgment in which it clarified a number of elements. Pursuant to Article 67 of the Convention the Court can interpret its judgments if so requested by one of the parties. Nevertheless, a request for interpretation should not be used as a disguised form of appeal, but its exclusive objective should be to clarify the meaning of a judgment when parties are of the opinion that the text in the operative paragraphs lack clarity or precision.[1077]

[1075] Furthermore, regarding the Moiwana village case, no independent investigation into the facts of the 1986 massacre has been conducted yet.

[1076] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*. Concluding Observations of the Committee on the Elimination of Racial Discrimination, Suriname, CERD/C/SUR/CO/12, 13 March 2009, Consideration of Reports Submitted by States Parties under Article 9 of the Convention. Order of the President of the Inter-American Court of Human Rights of April 20, 2010, Case of the Saramaka People v. Suriname, Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 23, 2011, Case of the Saramaka People *v.* Suriname, Monitoring Compliance with Judgment. A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname. Request for Consideration of the Situation of the Saramaka People of Suriname under the Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures submitted by the Association of Saramaka Authorities and the Forest Peoples Programme, 22 January 2012.

[1077] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*, p. 4.

The Court explained a number of issues regarding compensation, environmental, and social impact assessments (ESIA's) and future concessions in Saramaka territory. But most importantly – for this study's purposes – it analyzed the issue of effective participation and the right to consultation.

The state asked the Court which particular members of the Saramaka people needed to be consulted, when this was mandatory, and how the system of benefit sharing ought to be structured. The Court explained that the State has the duty to consult with the Saramaka in relation to a number of elements in the judgment, and that it is up to the Saramaka people to determine, in accordance with their customs and traditions, which tribe members are to be involved in such consultations.[1078]

The Court explained that consultation is at least necessary with respect to the following issues:

> In this regard, the Judgment orders the State to consult with the Saramaka people regarding at least the following six issues: (1) the process of delimiting, demarcating and granting collective title over the territory of the Saramaka people; (2) the process of granting the members of the Saramaka people legal recognition of their collective juridical capacity, pertaining to the community to which they belong; (3) the process of adopting legislative, administrative, and other measures as may be required to recognize, protect, guarantee, and give legal effect to the right of the members of the Saramaka people to the territory they have traditionally used and occupied; (4) the process of adopting legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs; (5) regarding the results of prior environmental and social impact assessments, and (6) regarding any proposed restrictions of the Saramaka people's property rights, particularly regarding proposed development or investment plans in or affecting Saramaka territory.[1079]

The Court further reiterated its explanation regarding the last point, of when consultation is necessary – which is always - and that such consultation should always have the goal of reaching agreement (FPIC). It further restated that sometimes, when the impact of such development or investment plans is "significant" or "major," the state also has the duty to obtain FPIC. This rather

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[1078] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*, p. 5.

[1079] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*, pp. 5-6.

unclear conceptualization of the structure of effective participation rights and FPIC, will be explained further in the following paragraphs.

The Court deliberately omitted any consideration as to who must be consulted, since it is up to the Saramaka people to decide and communicate to the state who their representatives are.[1080] Furthermore, in the interpretation judgment, the Court again emphasized that consultation is always necessary and that this involves a number of elements – free, prior, informed – in order to adhere to the standard of effective participation. Free, prior and informed consent therefore is always the goal of such consultations and guides its form, while in some cases FPIC becomes mandatory for the State to obtain.

These requirements of consultation and consent are thus part of the safeguards the Court develops to protect the "survival" of tribal or indigenous communities. The Court reiterated in its interpretation judgment that "survival" entails more than just physical survival:

> The Court emphasized in the Judgment that the phrase "survival as a tribal people" must be understood as the ability of the Saramaka to "preserve, protect and guarantee the special relationship that [they] have with their territory," so that "they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected […]." That is, the term "survival" in this context signifies much more than physical survival.[1081]

This forms the rationale behind the Court's requirements of effective participation and ESIA's. The Court refers to the "Akwé Kon guidelines" as one of the most used systems for implementing ESIA's in relation to indigenous peoples.[1082] The Akwé Kon guidelines will be discussed in the next paragraphs, on voluntary initiatives.

In the interpretation judgment, the Court reiterated that *control* over traditional territories is essential for indigenous peoples and that this entails: "The right to manage, distribute, and effectively control such territories, in accordance

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[1080] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*, p. 7.

[1081] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*, paragraph 37.

[1082] Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. Published by the Secretariat of the Convention on Biological Diversity, 2004.

with their customary laws and traditional collective land tenure system."[1083] Again it becomes very clear why self-determination and FPIC are such central claims indigenous peoples make: without these concepts, control over their traditional territories is virtually impossible. These concepts are not temporary measures or positive discrimination policies, but permanent rights.[1084] Nevertheless, restrictions are possible but only under strict conditions. The Court emphasized this in its interpretation judgment.

Finally, but most importantly, the Court explained that FPIC is always necessary in cases where the rights of indigenous communities to their lands have not been streamlined with the IACtHR's system. It is therefore only when the full system of indigenous property rights has been implemented, that the "major impact" criterion is applicable. The Court reaffirms and stresses the importance of its earlier decision:

> Until said delimitation, demarcation, and titling of the Saramaka territory has been carried out, Suriname must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the *free, informed and prior consent* of the Saramaka people. With regards to the concessions already granted within traditional Saramaka territory, the State must review them, in light of the present Judgment and the Court's jurisprudence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people.[1085]

Moreover, the Court explicitly stated that this criterion is not only applicable to the Saramaka but also to any other indigenous or tribal people that is affected by development or investment projects. Hereby the Court clearly indicated that Saramaka is to be an important precedent.

Notwithstanding the elaborate and arguably clear system the Court developed, the implementation process in Saramaka v. Suriname has run far from smoothly. It is to this issue that we will now divert our attention.

[1083] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*, paragraph 50.

[1084] Mackay F, *Saramaka, de Strijd om het Bos* (KIT Publishers, 2010), p. 48.

[1085] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*, paragraph 55. Italics added.

Saramaka: Monitoring Compliance

Monitoring compliance with its judgments is a power inherent to the judicial functions of the IACtHR, and in the period after the judgment in Saramaka, two compliance reports have been issued, in 2010 and 2011, respectively.[1086] Judgments of the Inter-American Court are binding for parties to the Convention and the obligation to comply with rulings of the Court are a basic principle of law regarding State responsibility. The principle of *pacta sunt servanda* implies that States must comply with international treaty obligations in good faith, and national legislation cannot be invoked to escape international responsibility.[1087] The Court emphasized that States parties to the Convention must guarantee compliance with its provisions and their effects (*effet utile*) into their national legal orders.[1088] It stressed that this principle applies not only to substantive provisions of human rights treaties but also with respect to procedural obligations such as the rules regarding compliance with the Court's decisions.

Referring to earlier decisions, the Court explained that: "These obligations are to be interpreted and implemented in such a way that the protected guarantee is truly practical and effective, considering the special nature of human rights treaties."[1089] The Court therefore acknowledges that genuine implementation, that is *effective* implementation of its judgments, is vital and a matter of ongoing concern for safeguarding human rights. As was discussed above, implementation of the Court's judgments in amongst others the Awas Tingni, Yakye Axa, and Sawhoyamaxa cases was a long and troubled process. Unfortunately, Saramaka is no exception in this respect.

In the compliance report, the Court assessed to what extent its judgment have been implemented. In the first report, dated April 10, 2010, the Court found that although some action had been undertaken, almost none of the orders of the Court had been carried out. It continued to monitor compliance and convened a closed hearing at the seat of the Court in San José in May 2010. A second report followed in November 2011, almost a year after the deadline for implementation had been met.

Although regular meetings between the representatives of the Saramakas and government were held, the State has not complied with the duty to delimit, demarcate and title Saramaka land. A project called "Support for the Sustainable Development of the Interior" was stopped because it lacked adequate stakeholder

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1086 Order of the President of the Inter-American Court of Human Rights of April 20, 2010, Case of the Saramaka People v. Suriname, Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 23, 2011, Case of the Saramaka People *v.* Suriname, Monitoring Compliance with Judgment.

1087 See: Vienna Convention on the Law of Treaties, 1969, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, Article 26 - 27.

1088 Order of the Inter-American Court of Human Rights of November 23, 2011, Case of the Saramaka People *v.* Suriname, Monitoring Compliance with Judgment, p. 5.

1089 Order of the Inter-American Court of Human Rights of November 23, 2011, Case of the Saramaka People *v.* Suriname, Monitoring Compliance with Judgment, p. 5.

support, but the State and Saramaka people signed an agreement in which it was declared that the state would assist the Saramakas in the delimitation process.[1090] But this was not enough to comply with the Court's orders, and the IACtHR stated that in addition to complying with the requirements mentioned, the State also had to report on the specific action it was to take related to consultation of the Saramakas. Furthermore, since the State failed to meet the deadlines, it was ordered to submit a detailed schedule for compliance to the Court.[1091]

With regard to new and existing concessions, the Court warned Suriname that continuing with those activities, while Sarmaka territory had not been delimited yet: "without the consent of the Saramaka and without prior environmental and social impact assessments, would constitute a direct contravention of the Court's decision and, accordingly, of the State's international treaty obligations."[1092] For each of these concessions, the State has to show the Court that it had ensured the Saramaka's effective participation, that there was a benefit-sharing agreement concluded and whether ESIA's had been carried out in a proper way.

With respect to the creation of a legal framework that recognized the legal personality of the indigenous and Maroon peoples of Suriname, *in casu* the recognition of the collective juridical personality of the Saramakas, not much progress was made. The most important parts of the Saramaka judgment had not been implemented almost four years after the judgment, although some action in the right direction had been undertaken.

In this respect, it is interesting to discuss the reports of the Committee on the Elimination of Racial Discrimination and the findings of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, who visited Suriname in 2011 to assist in solving the implementation problems.

Alternative Routes towards Compliance

The Committee on the Elimination of Racial Discrimination

Besides the Inter-American Court, other mechanisms have been involved in the monitoring and promotion of compliance to the Saramaka judgment. Most prominently, the Committee on the Elimination of Racial Discrimination (CERD) and the UN Special Rapporteur on the Rights of Indigenous Peoples have played an important role. Their actions and findings will be discussed here.

In the *2009 CERD report*, in which the Committee explored the periodic reports of Suriname, it noted that it was deeply concerned about the

[1090] Order of the Inter-American Court of Human Rights of November 23, 2011, Case of the Saramaka People *v.* Suriname, Monitoring Compliance with Judgment, pp. 6-7.
[1091] Order of the Inter-American Court of Human Rights of November 23, 2011, Case of the Saramaka People *v.* Suriname, Monitoring Compliance with Judgment, p. 8.
[1092] Order of the Inter-American Court of Human Rights of November 23, 2011, Case of the Saramaka People *v.* Suriname, Monitoring Compliance with Judgment, p. 10.

implementation of the Saramaka judgment and legislation on land and resource rights in a wider perspective.[1093]

The Committee noted that major problems were caused by natural resource extraction – mainly logging and mining – on indigenous and tribal traditional lands. It expressed its concern about the lack of any effective natural resource management regime.[1094] It urged Suriname to take steps towards: "A comprehensive national land rights regime and appropriate relevant legislation with the full participation of the freely chosen representatives of indigenous and tribal peoples."[1095] All this should happen in: "full compliance with the orders of the Inter-American Court of Human Rights in the *Saramaka people* case."[1096]

Central in the CERD report are the requirements of consultation and consent. The Committee urged the state to consult and involve the affected tribal or indigenous communities before granting mining concessions and recommended the that: "When taking legislative or administrative decisions which may affect the rights and interests of indigenous and tribal peoples, the State Party endeavor to consult and obtain their informed consent."[1097] The statement clearly reflects the wording of Article 19 of the UNDRIP.

More specifically, the Committee was concerned about the ongoing delays in compliance of the most crucial aspects of the Moiwana and Saramaka case, in particular concerning: "The recognition of communal and self-determination rights and the investigation and punishment of the perpetrators of the Moiwana Village massacre in 1986."[1098]

Although some steps towards consultations had been made, the Committee argued that there are still situations in which indigenous peoples do not: "participate in decisions which affect them with a view to securing their

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[1093] CERD/C/SUR/CO/12, 12 March 2009, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Suriname.

[1094] CERD/C/SUR/CO/12, 12 March 2009, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Suriname, paragraph 12.

[1095] CERD/C/SUR/CO/12, 12 March 2009, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Suriname, paragraph 13.

[1096] CERD/C/SUR/CO/12, 12 March 2009, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Suriname, paragraph 13.

[1097] CERD/C/SUR/CO/12, 12 March 2009, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Suriname, paragraph 14.

[1098] CERD/C/SUR/CO/12, 12 March 2009, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Suriname, paragraph 18.

agreement."[1099] The terminology chosen is in line with what was discussed earlier: FPIC should always be the goal of consultation processes.

The CERD report affirms the criteria with regard to participation and FPIC enshrined in the Saramaka judgment and UNDRIP. This is indicative of the alignment of these specific criteria in international law, a trend that was described at length in Part III and IV of this study.[1100]

The UN Special Rapporteur on the Rights of Indigenous Peoples' Study on Suriname

In March 2011, James Anaya, the second Special Rapporteur on the Rights of Indigenous Peoples, visited Suriname, after the Government of Suriname requested his technical and advisory assistance in developing a legal framework for securing indigenous and tribal rights. The report following Anaya's visit contains some of the most interesting perspectives on how to implement the Inter-American system of land, resource, and participation rights, and therefore will be discussed at some length. Although in his report Anaya focused on the Surinamese context, it contains references to other countries and provides insights relevant to situations outside Suriname. Anaya's report makes observations and recommendations to assist Suriname in the development of laws and administrative measures to secure indigenous and tribal peoples' rights, in particular their rights over lands and natural resources.[1101] In the report it was stressed that participation and FPIC play a vital role in this respect.[1102]

Anaya contended that although some advancements made have been made in the implementation of the orders of the IACtHR with respect to the Saramaka judgment, Suriname has not yet complied with the most important substantive elements of the decision. This includes first, the demarcation and titling of the Saramaka communities' lands and second, the development of laws or procedures to carry out that process with the effective participation of the people involved.[1103] In the report it was stressed that these two issues will have

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[1099] CERD/C/SUR/CO/12, 12 March 2009, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Suriname, paragraph 18.

[1100] Also remember the statement by the Human Rights Committee in the Poma case: "The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community." HRC, Poma Poma v.Peru, Comm. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (2009).

[1101] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname.

[1102] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 4.

[1103] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 11.

to be resolved in order to: "Avoid a prolonged condition of international illegality."[1104]

The primary tool to promote the "process forward," according to Anaya, is the need for consultations with indigenous and tribal peoples. The Rapporteur noted that while there is not one formula (as is also argued throughout this study), there are a number of elements and principles that are vital for any effective participatory process. He provided a concise overview of these principles:

> These required elements of consultations include that they must: be distinct from consultations that may involve the general public or ordinary political processes; take place at the earliest possible stage; be a genuine dialogue and more than just the provision of information; be in good faith with the objective of obtaining agreement or consent; be carried out with due regard for indigenous peoples' traditional decision-making institutions in the appropriate languages; provide the time necessary for the indigenous peoples to make decisions, taking into account their customary ways of decision-making; and provide information sufficient to allow indigenous peoples to make decisions that are informed.[1105]

This brief statement indeed reflects the most important elements of consultation/consent processes, and is in line with what is argued throughout this study. It provides basic guidelines for any consultation process with indigenous or tribal peoples.

In order to facilitate such consultations, the Rapporteur argued that Suriname should firstly establish a *platform for consultations*, and he referred to the Coordinating Commission on Territorial Demarcation, that was formed following the Awas Tingni judgment and that has led to the demarcation of over 10.000 km² of indigenous territories on the Atlantic Coast of Nicaragua.[1106] The Nicaraguan case illustrates that judgments that concern a specific community have implications for a far wider number of indigenous groups.

Such a platform, or joint commission, should establish a clear timetable and measurable benchmarks related to the adoption of specific documents to be drafted. Anaya suggested a framework law and additional legislation regarding, in

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[1104] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 11.

[1105] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 20. These were also discussed earlier in relation to the studies into the right to effective participation by the Special Rapporteur and the Expert Mechanism.

[1106] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 27.

particular, a procedure for demarcating and titling indigenous and tribal lands and a procedure to follow for consultations with indigenous and tribal peoples on activities affecting their lands and resources.[1107]After the drafting of the instruments, consultation rounds should follow on community level, in line with international standards. When the final drafts are discussed in Parliament, special legislative arrangements should be made for indigenous and tribal representatives to participate in this last stage.[1108]

The Special Rapporteur also referred to the different international technical and financial resources that are available. Referring again to the Awas Tingni follow-up, he mentioned that assistance from the Inter-American Commission, the Inter-American Development Bank, the United Nations Development Program, the International Labor Organization, and the World Bank, is available.[1109]

Anaya devoted special attention to a 2005 draft text, developed by indigenous representatives, in which amendments were proposed to the Constitution of Suriname and an "Organic Law on the Rights of Indigenous and Tribal Peoples."[1110] Although the draft text includes provisions on self-determination, legal recognition, land and resource rights, and participation, there has been virtually no progress towards adopting this instrument.[1111] Therefore, the Rapporteur proposed that – in addition to a framework law – a more practical instrument is developed, which again has as its two most important elements land and resource rights and consultation procedures:

> In light of the Moiwana and Saramaka judgments, the Special Rapporteur is of the opinion that priority should be placed on developing specific legal provisions for (1) a procedure to identify and title indigenous and tribal lands; and (2) a procedure to follow

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1107 A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 24.

1108 A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 25.

1109 A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 27.

1110 A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 29. The text of the proposal is annexed to the Special Rapporteur's report.

1111 The 'Proposal for legal provisions recognizing indigenous and tribal peoples' rights in the laws of Suriname' contains a proposed amendment to the Constitution, which recognizes indigenous and tribal peoples juridical personality, participatory rights, land rights and FPIC requirements. The Draft Organic Law adds further details and entails a wide number of rights, including a chapter on land rights which requires FPIC in relation to projects on indigenous territories and environmental and social impact assessments. The draft also refers to different international instruments.

> for consulting with and seeking consent of indigenous and tribal peoples for resource extraction and other activities affecting their lands and resources.[1112]

The remainder of the report is devoted to explaining how these two procedures could be implemented.

With respect to the *land titling process*, Anaya explained that although there is some flexibility allowed, there are a number of minimum components that such a process should entail:

> It could be expected, nonetheless, that the procedure for land demarcation and titling would contain, at a minimum, the following components: (a) identification of the area and rights that correspond to the indigenous or tribal community, or group of communities, under consideration; (b) resolution of conflicts over competing uses and claims; (c) delimitation and demarcation; and (d) issuance of title deed or other appropriate document that clearly describes the nature of the right or rights in lands and resources.[1113]

The fundamental goal of these processes is to "provide security for land and resource rights in accordance with indigenous and tribal peoples' own customary laws and resource tenure."[1114] These guidelines seem to be a helpful explanation of the Court's order and are based on previous experiences elsewhere.

Anaya made clear that in addition to an adequate procedure for land titling, it is vital to have a clear and practical approach on the specific responsibilities for states and third parties (e.g. companies) for *consultations* with indigenous communities when development or other activities affect their territories.[1115] Although the rules in international law and the IACtHR's judgments do not forbid development projects on indigenous lands, they do make clear that such projects will have to respect indigenous rights and that during implementation of these projects, the standards of consultation and FPIC are followed. Although these procedures should be flexible, the minimum requirements – mentioned above – ought to guide the participatory process.

[1112] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 35.

[1113] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 36.

[1114] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 36.

[1115] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 37.

The Special Rapporteur offers a detailed explanation on how to implement the Inter-American system on indigenous peoples land, resource, and participation rights. The Surinamese case is particularly illustrative, since no adequate legal framework on indigenous rights exists. Unfortunately, the Surinamese government has not given any follow up or reply to the gesture of the Special Rapporteur to offer further technical and advisory assistance.[1116]

Nevertheless, the report includes valuable insights into implementation of the Court's system on land and resource rights. There is a central role for FPIC and effective participation procedures, as mechanisms to prevent or solve conflicts of interests. For Suriname, it is vital to harmonize the Constitutions and existing laws and policies in order to comply with the Court's order in Saramaka. Anaya's suggestions leave room for flexibility, but do establish minimum standards for land and participation rights.

V.1.2.5 Legal Developments in the Aftermath of Saramaka People v. Suriname

As was illustrated, in *Saramaka people v Suriname* the Court expanded and explained the Inter-American system on property and participation rights, but implementation of the Court's orders has not been without delay. This paragraph will discuss the (mostly legal) developments in the aftermath of Saramaka. Firstly, an overview of the situation after Saramaka in Suriname will be provided and legal applications will be discussed. Secondly, two judgments of the Court, regarding other states and peoples within the Inter-American human rights system will be examined.

V.1.2.5.1 Suriname: CERD and the Inter-American Commission

The current situation in Suriname is not very encouraging, since there has been virtually no further progress on implementing a land rights regime and a legal framework for the recognition of indigenous rights. In this light, the Forest Peoples Programme, a UK based NGO that represents indigenous and Maroon peoples in Suriname, requested CERD to consider the situation of the Saramaka people under its Urgent Action and Early Warning Procedures in January 2012.[1117]

[1116] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 41. Unfortunately, there has been no further contact between the Special Rapporteur and the Surinames government after the publication of his report.

[1117] Request for Consideration of the Situation of the Saramaka People of Suriname under the Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures submitted by the Association of Saramaka Authorities and the Forest Peoples Programme, 22 January 2012. The Committee on the Elimination of Racial Discrimination has expressed its concern about the Surinamese situation on different occasions. See: *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/64/CO/9/Rev.2, 12 March 2004; *Decision 3(62), Suriname*. UN Doc.

Suriname informed the Human Rights Council in September 2011 that it was unable to comply with recommendations made during the Universal Periodic Review (UPR). These recommendations entailed that Suriname was to fully implement the Court's decision in Saramaka People.[1118] According to the state, it was difficult to reach agreement on the land rights issue, since: "It was not just a matter of copying what had happened in other countries in the region. Suriname needed to find a Surinamese solution, and that was why Suriname would ask for some time to deal with this matter."[1119]

The Government claimed that these issues needed further studying and that it would organize a "national land rights conference" on the topic.[1120] In October 2011, the Government held this conference (the "grondenrechten-conferentie") in Colakreek. While a lot of effort was put into the organization of this meeting, it was cancelled unilaterally by the President after one day, after a statement was read on behalf of indigenous and tribal peoples. The statement made references to land, resource, and self-determination rights, in line with what was ordered in Saramaka People v. Suriname, but according to a press conference by the President on 23 October 2011, self-determination and property rights over land and resources were "contrary to the Constitution."[1121] The failed Land Rights Conference was a major setback for indigenous rights in Suriname and since then no progress on the implementation of the Saramaka case has been made.

Lee Swepston, former human rights coordinator of the ILO, has suggested that ratification of ILO 169 would be a giant leap forward for Suriname, since it would create a robust legal framework for the recognition of indigenous and tribal rights in Suriname, both in relation to land and resource rights and with

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CERD/C/62/Dec/3, 03 June 2003; *Decision 1(67), Suriname*. UN Doc. CERD/C/DEC/SUR/2, 18 August 2005; *decision 3(66), Suriname*. UN Doc. CERD/C/66/SUR/Dec.3, 09 March 2005; and *Decision 1(69), Suriname*. UN Doc. CERD/C/DEC/SUR/3, 18 August 2006.

[1118] Request for Consideration of the Situation of the Saramaka People of Suriname under the Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures submitted by the Association of Saramaka Authorities and the Forest Peoples Programme, 22 January 2012, p. 2.

[1119] Request for Consideration of the Situation of the Saramaka People of Suriname under the Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures submitted by the Association of Saramaka Authorities and the Forest Peoples Programme, 22 January 2012, p. 4. *Report of the Working Group on the Universal Periodic Review: Suriname*. UN Doc. A/ HRC/18/12, 11 July 2011. There is no information available on what this 'Surinamese solution' might entail, nor has the State produces any arguments that explain why the Surinamese context is so substantially different from other countries in the region.

[1120] *Report of the Working Group on the Universal Periodic Review: Suriname*. UN Doc. A/ HRC/18/12, 11 July 2011, paragraphs 15–18 and 21.

[1121] Request for Consideration of the Situation of the Saramaka People of Suriname under the Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures submitted by the Association of Saramaka Authorities and the Forest Peoples Programme, 22 January 2012, p. 8.

regard to consultation and consent. Unfortunately, Suriname stated in response to a question of the Norwegian delegation at the UPR that:

> As for the question from Norway regarding the timeframe in which Suriname intended to ratify and implement the International Labour Organization Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries, the delegation stated that the essence of that Convention was the recognition of the rights of indigenous people, including their collective land rights. Given the current state of affairs in relation to the consultative process, Suriname was not yet able to ratify the Convention No. 169.[1122]

The litigation process within the OAS context, Saramaka People v. Suriname and its relative success for Maroons in Suriname, has motivated indigenous peoples in Suriname to pursue justice before the human rights entities of the Inter-American system as well.

Already in October 2007, the Inter-American Commission issued its admissibility report in the *Kaliña and Lokono Peoples case*.[1123] The applicants complained that a number of private land titles have been given to non-indigenous persons between 1976 and 2006 in indigenous villages in the area of the Lower Marowijne. Furthermore, they complained that mining concessions for bauxite have been granted and that three nature reserves were established without the knowledge or consent of the Kaliña and Lokono communities.[1124] The claim and context are very similar to those in Saramaka. The petitioners claimed a violation of Articles 3, 21, and 25 of the Convention, and like in Saramaka contend that the State of Suriname does not recognize their property rights, does not legally recognize the communities, and does not offer adequate judicial protection nationally. The Commission declared the petition admissible and continued its investigation of the merits of the case.[1125] In March of 2012, the Commission arranged a hearing and an on-site visit of Commissioner Shelton is being organized.

[1122] *Report of the Working Group on the Universal Periodic Review: Suriname*. UN Doc. A/HRC/18/12, 11 July 2011, paragraph 21. Special Rapporteur James Anaya already noted that the principles of ILO Convention No. 169 are valid in the Surinamese context, even though Suriname has not ratified the Convention.

[1123] Inter-American Commission on Human Rights, Organization of American States, REPORT Nº 76/07, Petition 198-07, Admissibility, The Kaliña And Lokono Peoples, Suriname, October 15, 2007.

[1124] Inter-American Commission on Human Rights, Organization of American States, REPORT Nº 76/07, Petition 198-07, Admissibility, The Kaliña And Lokono Peoples, Suriname, October 15, 2007, paragraph 4.

[1125] Inter-American Commission on Human Rights, Organization of American States, REPORT Nº 76/07, Petition 198-07, Admissibility, The Kaliña And Lokono Peoples, Suriname, October 15, 2007, paragraph 69.

The second case, The *Kaliña Indigenous Community of Maho* Case (Maho) is still in an earlier stage, as the petition to the Commission was sent in December 2009.[1126] Maho is a Carib (Kaliña) indigenous community, which lives in the Saramacca district in close proximity to the Saramacca River and the Maho Creek. The Community does not have access to running water, sewage, or sanitation systems and there is no electricity in the village. The Maho Community's lands are threatened by sand mining and third parties claiming private property titles. While most of the community's members have already been forced to leave, the remaining members have been threatened by third parties and their situation was so troublesome that in 2007 the victims held a hunger strike.[1127]

In their claim before the commission the community asserts violations of Article 3, the right to juridical personality, Article 4(1), the right to life, Article 5(1), the right to humane treatment, Article 13, the right to freedom of information, Article 21, the right to property, and Article 25, the right to judicial protection.[1128] While the Commission has not decided on the merits yet, the situation of the Maho community was so worrisome that it did decide on adopting precautionary measures. The Commission explained:

> On October 27, 2010, the IACHR granted precautionary measures for the inhabitants of the Maho Indigenous Community, in Suriname. The request for precautionary measures alleges that since 1990, the organization Stichting Mohsiro and other third parties have allegedly been encroaching upon the 65 hectares of land that was reserved for the Maho Community in 1971. It is also alleged that at times, the invaders have destroyed the community's crops and threatened its members' physical integrity. It is alleged that as a result of these actions, the extinction of this community may be imminent. The Inter-American Commission asked the State of Suriname to take the measures necessary to ensure that the Maho Community can survive on the 65 hectares that have been reserved for it free from incursions from persons alien to the community, until the Commission has decided on the merits of the petition.[1129]

[1126] In January 2014, the Commission formally referred the case to the Inter-American Court of Human Rights.

[1127] Petition Submitted to the Inter-American Commission of Human Rights, Organization of American States, by The Kaliña Indigenous Community of Maho and The Association of Indigenous Village Leaders in Suriname against the Republic of Suriname, 8 December 2009.

[1128] Petition Submitted to the Inter-American Commission of Human Rights, Organization of American States, by The Kaliña Indigenous Community of Maho and The Association of Indigenous Village Leaders in Suriname against the Republic of Suriname, 8 December 2009, paragraph 6.

[1129] See: Website of the Inter-American Commission on Human Rights: http://www.oas.org/en/iachr/decisions/precautionary.asp. Article 25 of the Rules of Procedure establish that, in serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to

In addition to the Commission, the Committee on the Elimination of Racial Discrimination considered the Maho situation on a preliminary basis under its early warning and urgent action procedure. In its letter to the permanent representative of Suriname to the UN, CERD expressed its grave concerns about the serious violations of the rights of indigenous peoples in Suriname, and of the Maho Community in particular.[1130] It requested Suriname to inform the Committee about which measures have been taken to comply with the Inter-American Commission's decision on precautionary measures. The Committee referred to its earlier reports on Suriname, related to: "The serious violations of the rights of indigenous peoples, the failure to recognize their rights to lands and resources, the refusal to consult them and to seek their free, prior and informed consent when granting mining concessions to foreign companies whose activities would have threatened their livelihood."[1131] No information about state compliance is available and representatives from indigenous organizations have stated that no follow-up action was undertaken by the State.

Both the *Kaliña and Lokono* case and the *Maho* case share a number of similarities with *Saramaka*, and they indicate that the problems for indigenous and Maroon communities in Suriname are widespread and shared. Without a proper legal framework and legal recognition, there is little hope that the issues will be resolved in the near future.

V.1.2.5.2 The OAS Region and the Inter-American Court: Xákmok Kásek and Sarayaku

After the Saramaka judgment, the Inter-American Court has decided on the merits in two cases that are related to property and participation rights for indigenous communities. The first is the case of the Xákmok Kásek Indigenous Community v. Paraguay (*Xákmok Kásek*) and the second, and more important one for present purposes, is the case of the Kichwa Indigenous People of Sarayaku (*Sarayaku*).[1132] Both cases will be explored briefly.

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prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case, as well as to persons under the jurisdiction of the State concerned, independently of any pending petition or case. The measures may be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group, or a community with identified or identifiable members.

[1130] See: Website of the Office of the High Commissioner on Human Rights: http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Suriname02092011.pdf.

[1131] Letter from the Chairperson of the Committee on the Elimination of Racial Discrimination to the Permanent Representative of the Republic of Suriname to the UN. See: Website of the Office of the High Commissioner on Human Rights: http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Suriname02092011.pdf.

[1132] IACtHR, Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214. & IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245.

Xákmok Kásek v. Paraguay

In 2010 the Court issued its decision in the case of *Xákmok Kásek v. Paraguay*, and held, in accordance with its earlier jurisprudence on indigenous land right and rights to restitution, that a part of the traditional lands of the Community should be returned to them.

The *Xákmok Kásek* community is a multi-ethnic group of about 300 people who reclaimed lands which are currently occupied by a private owned farm. The Community, whose partly nomadic livelihood is based on hunting, fishing, and gathering is very vulnerable due to the dispossession of their lands to private third parties. The State also created a protected area, which further limited the nomadic and traditionally self-sufficient way of life of the community. Many members were forced to seek employment on other farms and abandon their traditional way of life.[1133] Furthermore, a number of people, mostly children, died in recent years from preventable illnesses.

The Court argued that Article 21 covered not only the right to traditional lands for indigenous communities but also the right to reclaim specific ancestral lands because of their special cultural, spiritual and historical relation with them.[1134] The Court held that: "The Community's link to those lands is fundamental and unbreakable for its human and cultural survival."[1135]

In *Xákmok Kásek*, the Court found violations of a large number of rights, all connected with the denial of property rights to the Community. The Court judged that Paraguay had violated the rights to property, fair trial, and judicial protection (Art. 21, 8 and 25 of the Convention). Furthermore, the rights to life, to personal integrity, and to the recognition of juridical personality were violated. Lastly, the Court also found a violation of the rights of the child, since their rights to healthcare and education were insufficiently guaranteed by the State.[1136]

In *Xákmok Kásek* the Court reaffirmed its earlier reasoning on land and restitution rights, and showed (again) that without effective control over their territories, indigenous peoples may become the victim of a number of other human rights violations. The Court also emphasized that there is a special duty for the State to provide assistance to marginalized communities with regard to healthcare and other basic services. In relation to effective participation the Court reaffirmed its ruling in Saramaka and stated that:

1133 The Human Rights Brief, Centre for Human Rights and Humanitarian Law: http://hrbrief.org/2010/11/inter-american-court-rules-in-favor-of-paraguayan-indigenous-group-in-land-rights-case/.

1134 I IACtHR, Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214.

1135 IACtHR, Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, paragraph 282.

1136 IACtHR, Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214., paragraph 258.

> In this regard, the Court finds that, in order to guarantee the right to property of the indigenous peoples […] the State must ensure the effective participation of the members of the Community, in accordance with their customs and traditions, in any plan or decision that could affect their traditional lands and restrict the use and enjoyment of these lands, to ensure that such plans or decision do not negate their survival as indigenous people.[1137]

The reparations reflected the large number of violated rights. Paraguay was ordered to return the traditional land to the community, to provide goods and basic services, to adjust its domestic laws, to publish and broadcast the judgment, and to pay compensation.[1138]

While *Xákmok Kásek* does not substantially expand the Inter-American system on property rights, it is an important reaffirmation of the Court's reasoning, and serves to reinforce the Court's argumentation.[1139]

Sarayaku v. Equador

More important for this study's purposes is the recent ruling in *Sarayaku v. Ecuador.*[1140] In this decision, the Court took the opportunity to reflect on the right to consultation and consent, and it is the first time, since Saramaka people v Suriname, that participation rights in relation to projects affecting indigenous territories were explained and upheld in a binding decision. The case is of tremendous importance, because the Court upheld the Saramaka criteria for effective participation and explained the different elements necessary for an adequate consultation process. Moreover, it reiterated the Saramaka argument that FPIC should always be the goal of consultation processes, but that in case of large scale projects that have a significant impact on the community, it is mandatory for the State to obtain full consent. The Court explained that respect for the right to consultation is essential for protection of both the right to property and the right to cultural identity.

The Kichwa community of Sarayaku has a population of about 1200 people, who live from subsistence agriculture, hunting, and gathering on their traditional territories. About 90% of their food needs are met by traditional subsistence means, while about 10% of the food needs are products brought in from places

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1137 IACtHR, Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, paragraph 158.

1138 IACtHR, Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, paragraphs 276 – 331.

1139 The Xákmok Kásek case is quite similar to the other two cases involving Paraguay that were discussed in this paragraph: Sawhoyamaxa and Yakye Axa.

1140 IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245.

outside their territory.[1141] Decisions on important issues are made in the Tayja Saruta-Sarayaku, the traditional community assembly, which is composed of different traditional leaders, shamans, and advisors.[1142]

In the nineties, Petroecuador (the State owned oil company) signed a prospecting deal with Argentine and US companies for oil exploitation. Much of the lands in the deal are traditional lands of the Kichwa community. While protests and domestic legal action had already brought oil exploitation to a halt until 2010, there had already been an "exploration phase" during which a lot of damage had been done to the community's territories. The oil company already felled a large number of trees, destroyed a sacred site, and polluted several water sources. Moreover, 467 holes had been drilled in the area in which 1433 kg of high-impact explosives were packed. After the temporary stop of the prospecting project, the vast majority of the explosives remained in Sarayaku territory.[1143] Furthermore, the seismic prospecting activities went hand in hand with a militarization of the Sarayaku area.[1144]

In 2003 the Sarayaku community took the case to the Inter-American Commission on Human Rights, who then presented the case to the Inter-American Court in 2006 after the Commission's 2004 precautionary measures requiring the operations to be suspended were ignored by the state.[1145]
In its judgment of June 2012, the Court decided that Ecuador had violated the Kichwa community's right to prior consultation, communal property and cultural identity when the seismic prospecting project was approved. Moreover, the activities threatened the community's members rights to life and personal integrity and Ecuador had violated the community's right to judicial protection.[1146]

[1141] Inter-American Commission on Human Rights, Application to the Inter-American Court of Human Rights in the case of Kichwa People of Sarayaku and its members (case 12.465) against Equador, April 26, 2010, paragraphs 49 & 51.
[1142] Inter-American Commission on Human Rights, Application to the Inter-American Court of Human Rights in the case of Kichwa People of Sarayaku and its members (case 12.465) against Equador, April 26, 2010, paragraph 53.
[1143] Only approximately 10% of the explosives were actually removed from Sarayaku territory. See: Cultural Survival, Confirming Rights: Inter-American Ruling Marks Key Victory for Sarayaku People in Ecuador, http://www.culturalsurvival.org/publications/cultural-survival-quarterly/confirming-rights-inter-american-court-ruling-marks-key.
[1144] Inter-American Commission on Human Rights, Application to the Inter-American Court of Human Rights in the case of Kichwa People of Sarayaku and its members (case 12.465) against Equador, April 26, 2010.
[1145] Earthrights International, http://www.earthrights.org/blog/hard-earned-victory-indigenous-rights-latin-america-sarayaku-v-ecuador. Also see: Order of the Inter-American Court of Human Rights of February 4, 2010, Provisional Measures, Regarding the Republic of Ecuador Matter of the Kichwa Indigenous People of Sarayaku. & F Mackay, Forest Peoples Programme, Inter-American Court of Human Rights, Amicus Curiae Brief in the Case of the Pueblo Indígena Kichwa de Sarayaku v. Ecuador, 22 July 2011.
[1146] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 341.

The Right to Consultation

The Court relied heavily on Saramaka People v. Suriname in explaining what the duty to consultation entailed. It confirmed the safeguard-criteria from Saramaka – effective participation, prior social and environmental impact assessments, and reasonable benefit sharing – and emphasized that consultation must be carried out in good faith in order to achieve agreement or consent between parties. Consultation of indigenous communities must be conducted in the first planning stages of development projects which will affect their lands and resources.[1147]

In the Sarayaku case, there was no doubt regarding the right of the Sarayaku people to their territory, since this right was fully acknowledged by Ecuador. The Court thus proceeded to examine the obligation to guarantee the right to prior consultation, in relation to the right to communal property and cultural identity.[1148]

The Court reiterated its earlier jurisprudence – discussed in the preceding paragraphs – concerning the right to property. It emphasized again that indigenous conceptions of property may diverge significantly from classic concepts of property. It cited the Sawhoyamaxa judgment: "Disregard for specific forms of use and enjoyment of property, based on the culture, uses, customs and beliefs of each community, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people."[1149]

The Court repeated the important reasoning from Yakye Axa (and later cases) that the right to use and enjoy territory would be meaningless for indigenous and tribal communities if it were not connected with the protection of natural resources. The Court held that the connection between territory and natural resources is necessary for indigenous peoples' cultural and physical survival.[1150]

The Court proceeded to explain and reaffirm the limitation criteria that apply when the right to property is restricted. The additional Saramaka criteria of (a) effective participation, (b) prior ESIA's, and (c) reasonable benefit sharing were recognized and tested.[1151] Furthermore, the Court explained that the right to consultation is essential in order to respect indigenous peoples' right to

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[1147] Earthrights International, http://www.earthrights.org/blog/hard-earned-victory-indigenous-rights-latin-america-sarayaku-v-ecuador.

[1148] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 124.

[1149] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 145.

[1150] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 146.

[1151] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 157.

property and cultural identity: "One of the fundamental guarantees for ensuring the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation, which is recognized in ILO Convention No. 169, among other complementary international instruments."[1152]

The Court explained that the right to free, prior and informed consultations should be applied in different situations, covered by ILO Convention No. 169. It also referred to a large number of domestic systems, within the OAS region, in which the right to consultation has been enshrined.[1153]It explained that States are obliged under Article 1(1) of the American Convention to structure their domestic standards and institutions in such a way that indigenous communities can be consulted effectively, in line with existing international standards. Moreover, States must incorporate those standards within the prior consultation processes: "So as to generate sustained, effective and reliable channels for dialogue with indigenous communities in processes of consultation and participation through their representative institutions."[1154]

In an important passage, the Court summarized the requirements for effective participation by indigenous peoples in development or investment projects:

> The State has the duty to consult the community in an active and informed manner, and in accordance with its customs and traditions, in the context of a continuous communication between the parties. Moreover, these consultations should be undertaken in good faith, through culturally appropriate procedures and must be aimed at reaching an agreement. Similarly, the indigenous people or community must be consulted in accordance with its own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval. Also, the State must ensure that members of the community are aware of the potential benefits and risks so they can decide whether or not to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this obligation, or engaging in consultations without having regard to their essential characteristics, compromises

[1152] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 160.
[1153] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 164.
[1154] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 166.

the State's international responsibility.[1155]

Paragraph 177 of the judgment comprises a number of important statements from the cases analyzed in these paragraphs regarding consultation and consent processes, and the Court expressly stated that failure to comply with the right to consultation compromises the state's international responsibility. The Court evidently acknowledged that without a number of international guidelines on the content of the right to consultation, the right becomes easy to abuse. The Sarayaku case also allowed the Court to apply and test its criteria regarding effective participation and consultation.

Application of Free, Prior and Informed Consultation Processes in Sarayaku

The Court explained that to determine if the right to consultation has been respected, at least five elements are involved. It contended that the state's attempts at reaching agreement had to satisfy the minimum standards and essential requirements of a valid consultation process with indigenous communities and peoples in relation to their rights to communal property and cultural identity.[1156] It proceeded with analyzing the right to consultation in Sarayaku by means of these elements. Firstly, the Court examined if the consultation process was held *sufficiently prior.*[1157] Secondly, it analyzed if the goal of the consultations had been to *reach an agreement* (FPIC).[1158] Thirdly, the Court had to examine if the consultations had been *adequate and accessible*.[1159]

Fourth, it was examined if the environmental impact assessment had been conducted adequately and with the participation of the community.[1160] Finally, it had to be assessed whether the informational requirements had been met in the consultation process.[1161]

Regarding the first element, the Court explained that the Sarayaku had to be consulted during the first stages of the development plan and not only when it was necessary to obtain the community's approval.[1162] The Court enforced its

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[1155] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 177.
[1156] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 178.
[1157] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 180-184.
[1158] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 185-200.
[1159] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 201-203.
[1160] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 204-207.
[1161] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245,paragraphs 208-211.
[1162] IIACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 180.

argument by referring to the ILO Expert Committee and different countries in the region that had domestic legislation or case law on the matter.[1163]

Secondly, the Court stated that consultations must be in good faith and with the explicit objective to reach agreement or obtain consent regarding the proposed measure. Moreover, referring to the 2005 UNPFII Report on FPIC, the Court emphasizes that consultation does not constitute a mere formality but should be seen as a true instrument of participation, responding to the ultimate goal of establishing a dialogue between the parties based on principles of mutual trust and respect and with the aim of reaching consensus.[1164] It emphasized that consultation in good faith is incompatible with practices such as attempts to undermine the social cohesion of the affected communities, for example corrupting community leaders through appointing parallel representatives or negotiating with individual members contrary to international standards.[1165]

With respect to the Sarayaku, the Court established that the oil company had limited itself to offering money and other benefits to the community, in order to obtain its consent, without establishing and implementing a systematic and flexible process of participation and dialogue with them.[1166] The state had contributed to a climate of "conflict, division and confrontation" between the indigenous communities and discouraged a climate of respect among them. This way, and by inappropriately delegating its obligation to consultation to a private company, the state had failed to comply with the principle of good faith and its obligation to guarantee the Sarayaku's right to participation. The Court concluded that no genuine dialogue as part of the participation process - aimed at reaching an agreement - was established.[1167]

Thirdly, the Court held that consultation needs to be both *adequate* and *accessible*. It agreed with the ILO Committee of Experts in that there is no single model for an appropriate procedure, and that therefore the consultation model has to be contextualized and developed in line with indigenous peoples' own models of decision making and organization.[1168] In Sarayaku, the Court concluded that the community's form of political organization was not respected and that the actions carried out by the oil company in order to obtain the

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[1163] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 181-182.

[1164] Melo M, 'The Importance of the Sarayaku Case Sentence for Indigenous Rights in the Americas', The Pachamama Alliance, http://www.pachamama.org/news/sarayaku-lawyer-mario-melo-offers-analysis-on-historic-case. IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 177 & 186.

[1165] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 186.

[1166] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 194.

[1167] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 198-200.

[1168] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 201-202.

consent of the community could not be seen as appropriate or accessible consultation.[1169]

The fourth element the Court had to test in order to ascertain whether the consultations were conducted in a "free, prior and informed" manner, concerned the use of the environmental impact assessment. The Court referred to Saramaka and held that:

> The purpose of these studies is not only to have some objective measure of the potential impact on the land and the people, but also to ensure that members of the community are aware of the potential risks, including environmental and health risks, so that they can decide whether or not to accept the proposed development or investment plan knowingly and voluntary.[1170]

This statement clearly illustrates the value and purpose of impact assessments. These serve to facilitate informed consent processes, providing indigenous peoples with the relevant knowledge they need to make a truly informed decision about what happens to their lands and resources. In Sarayaku, the Court held that the environmental impact study was carried out without participation by the community, was carried out by a private company without State supervision, did not take into account the social, spiritual, and cultural impact of the proposed development plan, and was therefore not carried out in accordance with international standards and previous case law of the Court (Saramaka).[1171]

Finally, and very much in relation to the impact assessments, the Court required that consultation processes must be *informed*. As was described earlier, this does require the State to accept and provide information and implies constant communication between the parties. As was explored in Part III, informed refers as much to the process of communication as to the type of information that is to be provided.[1172] The Court concluded that the state did not carry out an effective and appropriate information process and that the

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[1169] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 203.

[1170] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 204-205. Refering to Saramaka People v. Suriname.

[1171] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 207.

[1172] In Sarayaku the Court established that the Kichwa were not adequately informed, did not participate in the process and did not inform the involved communities about advantages and disadvantages of the project. Moreover, the oil company did not aim to build a climate of respect and peaceful coexistence between the different parties, but divided and stimulated conflict among the different groups. I/A Court H.R., Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations, Judgment of June 27, 2012. Series C No. 245, paragraphs 209-210.

actions by the oil company also failed to meet the minimum requirements of prior consultation.[1173]

Importantly, after testing the different requirements that a "free, prior and informed" consultation process should entail, the Court established a firm link between the right to consultation, the right to communal property and the right to cultural identity. While other cases also made clear that the special relationship between indigenous peoples and their lands bear on their cultural identity, the connection has never been made this explicit. In Saramaka, the Court already held that lands and fair participation are essential to guarantee indigenous peoples cultural survival, and in Sarayaku the Court further explained this connection. It referred to other jurisdiction and platforms, like the ILO, UNDRIP, the African Commission on Human and Peoples' Rights (which will be examined later on), and the European Court of Human Rights in arguing that the right to cultural identity has a collective dimension for indigenous, native, or minority groups.[1174]

The connection between cultural identity and participation was stated unambiguously:

> The Court considers that the right to cultural identity is a fundamental right – and one of a collective nature – of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society. This means that States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization.[1175]

Very significant is also the argument by the Court that consultation and cultural identity are exponents of indigenous peoples right to *self-determination*. It referred to self-determination in UNDRIP and argued that it had even become enshrined in the Ecuadorian constitution of 2008.[1176]

The connection between failure to properly consult indigenous peoples and breaching rights to property and cultural identity is clearly stated by the Court in its concluding paragraph, cited here in full:

[1173] The Court held that the Sarayaku people were not consulted by the State prior to the company carrying out oil exploration activities, planting explosives or affecting sites of special cultural value. IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 211.

[1174] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 216–217.

[1175] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 217.

[1176] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 217.

> The State, by failing to consult the Sarayaku People on the execution of a project that would directly affect their territory, was in breach of its obligations, under the principles of international law and of its own domestic law, to adopt all necessary measures to guarantee the participation of the Sarayaku People, through their own institutions and mechanisms and in accordance with their values, traditions, customs and forms of organization, in the decisions made regarding matters and policies that affected or could affect their territory, their cultural and social life, their rights to communal property and to cultural identity. Consequently, the Court considers that the State is responsible for the violation of the right to communal property of the Sarayaku People, recognized in Article 21 of the Convention, in relation to the right to cultural identity, under the terms of Articles 1.(1) and (2) thereof.[1177]

The Inter-American Court decided unanimously that Ecuador had violated the right to consultation, to communal property, and to cultural identity under Article 21 of the American Convention, in relation to Articles 1(1) and 1(2).[1178] It ordered the State to consult the Sarayaku in a prior, adequate, and effective manner, and in full compliance with applicable international standards, when resource extraction might endanger their territories. Furthermore, the State had to implement legislation which gives effect to the right to prior consultation and to modify laws that prevented free and full exercise of this right. This process has to take place with full participation of the communities themselves.[1179]

Such processes of participation and prior consultation must be carried out in good faith, throughout all stages of the preparation and planning of projects. With regard to exploration or extraction projects, the Court explicitly confirmed the Saramaka criteria, that prior comprehensive environmental and social impact assessments had to be conducted, with full participation of the indigenous communities involved.[1180]

Conclusions: Saramaka Reaffirmed – "Free, Prior and Informed" further Explained

The explicit recognition of the right to consultation and the subsequent analysis of the different elements of FPIC are a step forward in relation to Saramaka, where the Court did not explicitly test these. The Court reiterated that consultations should be conducted in good faith and that they must aim to reach

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[1177] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 232.
[1178] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 341.
[1179] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 341.
[1180] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraph 300.

an agreement and consent. Furthermore, the Court stated that there is a strong relation between the right to consultation and the rights to collective property and cultural identity, which are all vital parts of indigenous peoples right to self-determination.[1181]

These two essential statements reflect the main line of argument of this study: establishment of an intercultural dialogue in a situation of discursive control is seen as the ultimate goal of effective participation and it is vital to secure collective property rights through participatory structures in order to respect indigenous peoples cultural identity and self-determination. Achieving FPIC should always be guiding in consultation processes. And in Sarayaku the Court took the opportunity to apply the requirements of "free, prior and informed" to a specific case.

As for reparations, the Court ordered Ecuador to pay damages to the community, remove the remaining explosives, make a public statement recognizing their international responsibility for the harms caused, and adapt the state's consultation processes so that they are in line with international law.[1182]

The *Sarayaku* case is the most important affirmation that the Inter-American system of property and participation rights, as it was constructed in Saramaka, is upheld and will play a larger role in the future when indigenous communities' territories are at stake. Furthermore, Sarayaku offered the IACtHR the opportunity to be much more clear about the guidelines and rules that are to be followed in order to respect the right of indigenous peoples to be consulted. More importantly, the Court did not elaborate on the question in which cases consent is legally mandatory for the State to obtain. Since Ecuador did not satisfy the preliminary obligation to consult, the Court did not find it necessary to specifically examine when consent is required.[1183] Although the Court reasoned that the duty to consult is now a general principle of international law, the scope and content of the requirement of consent are still underexposed. It seems inevitable that the Court will have to deal with this question in a later case. Nevertheless, it did explain further how the consultation process ought to be brought in line with the "FPIC requirements" free, prior and informed. In this respect it is an important and necessary next step after *Saramaka*.

V.1.2.6 Influence of the Inter-American System Outside the OAS Area

While this study is about FPIC and indigenous rights in international law, these paragraphs mainly discussed the jurisprudence on indigenous land and

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1181 IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, paragraphs 212-220.

1182 Earthrights International, http://www.earthrights.org/blog/hard-earned-victory-indigenous-rights-latin-america-sarayaku-v-ecuador.

1183 American Society of International Law, The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku, ASIL Insights, Vol. 16, Issue 35, November 28, 2012.

participation rights in the framework of the OAS.[1184] Therefore, this paragraph will discuss the impact that legal decisions in the Inter-American human rights system could have on other regional human rights structures. After briefly discussing the influence of the Inter-American Human Rights System on International Law - issues to which we will return in the overall conclusions - the *Endorois* decision of the African Commission on Human and Peoples' Rights will be debated, since this landmark decision for African indigenous peoples clearly shows how the judicial dialogue (or monologue) between different systems can take place. Endorois is the main example of how regional human rights norms may affect other regions. The African Commission cites frequently from Saramaka v. Suriname and other cases from the IACtHR, and refers to FPIC and communal property and resource rights.

The starting point for assessing the influence of the Court's decisions remains Article 59 of the ICJ Statute, which in which it is stated that: "The decision of the Court has no binding force except between the parties and in respect of that particular case."[1185] Nevertheless, the reasoning in one or a series of cases may become very authoritative when the argumentation is compelling. Although judicial decisions are regarded as a subsidiary means for the determination of the rules of law, they can be of immense importance.[1186] Over time judicial reasoning from international courts may become guiding for other decisions.[1187]

When judicial argumentation becomes so compelling – preferably in a number or sequence of similar cases – it is still allowed to deviate from the earlier decisions. In practice, however, substantial divergence in similar decisions does not happen too often. As was discussed, the Inter-American Court has upheld (and expanded) its reasoning about the system of collective property rights for indigenous peoples. An important sign that the Inter-American System becomes authoritative in other jurisdictions is of course when the judicial reasoning is quoted and followed elsewhere.

V.1.2.6.1 Judicial Interpretation and Approach

As explained, in interpreting the provisions of the American Convention in light of their object and purpose – the effective protection of human rights – the Court and Commission have stretched and developed their meaning to include a number of special measures for indigenous peoples. Protection of their lands and resources entails a number of positive obligations for the state, and

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[1184] As explained, this is because the Inter-American human rights of property rights includes norms of participation, consultation and FPIC.

[1185] Statute of the International Court of Justice, Article 59. Article 38, which qualifies legal decisions as a secondary source of international law.

[1186] Statute of the International Court of Justice Article 38, which qualifies legal decisions as a secondary source of international law. See: MN Shaw, International Law, Cambridge University Press, 2008, pp. 109-112.

[1187] A well known example is the ICJ's doctrine on customary international law.

guaranteeing indigenous peoples' effective participation is an important part of this.

Formally, a positivist approach dictates that the Court does not have any direct law-making authority.[1188] In positive international law, states are not legally bound to decisions of international institutions to which they are not parties. In this view, the Court would only have the formal authority to interpret and apply the law in relation to its parties. But in practice, it is no longer only states that create international law. In *Saramaka,* for example, the Court appeared to interpret elements of the UN Declaration as having gained the status of international custom, thereby shaping and interpreting international legal norms.

The Court chose an active approach, and instead of merely functioning as "*la bouche de la loi*," it endeavored to interpret and shape contemporary legal norms.[1189] This approach has been described by James Anaya as the post-modern realist method – a working method that uses interdisciplinary inquiries to determine how the law actually works or has worked in the past in relation to its effect on specific groups.[1190] The "evolutionary method" of purposive interpretation, as practiced by the Court in the Awas Tingni case and repeated in the following decisions by the Commission and Court, goes further than applying positive international law and rather progressively aims at genuinely addressing and posing solutions for the pressing needs of indigenous peoples.

The Court inquired into the *core values* of the American Convention's property provisions seen in light of the underlying values of the OAS Human Rights System. Moreover, the Court took into account the broader body of international law and contemporary developments within this field.[1191] The ICCPR (mainly articles 1 and 27) and ILO Convention No. 169 were considered as additional sources for interpreting the rights of the indigenous community.[1192]

[1188] Anaya S J, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', Colorado Journal of International Environmental Law and Policy 16, 2005, page 249.

[1189] International Courts in general tend to be more 'common law like', which implies a more active law-shaping role on behalf of the judge.

[1190] Anaya S J, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', Colorado Journal of International Environmental Law and Policy 16, 2005, page 250.

[1191] Anaya S J, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', Colorado Journal of International Environmental Law and Policy 16, 2005, page 253.

[1192] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. & ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entry into force 5 September 1991.

What is important, as will be shown, is that these judgments already serve as a point of reference for other international judicial and quasi-judicial decisions and documents.[1193] The Court adopts this dynamic or evolutionary (and indeed purposive) method of interpretation to expand the scope of Article 21 of the American Convention on Human Rights to include a collective or communal property right for indigenous and tribal peoples over their traditionally occupied lands and resources. Moreover, the Court develops and explains participatory requirements for the implementation of mentioned rights. Article 29 of the Convention determines a number of restrictions on the interpretive freedom the Court's judges have. Although in Article 29 ways in which the Convention should not be interpreted are provided, it can also be used to expand the Court's jurisdiction, since it enables the Court to take into account other human rights sources and view them from the perspective of the Convention. This is in line with the view that human rights are interdependent, and it allows the Court to take international conventions as well as national laws into account.[1194]

According to Aharon Barak's method of interpretation, which is quite similar to the system the IACtHR adheres to, it is not possible to know how to interpret the law unless the goal of such interpretive exercise is explicit. The goal of interpretation in general is to achieve the purpose of the law or a particular legal text. Of course, law has a purpose – it is a social device. The goal of interpretation is to achieve the social goal a particular law (and the legal system as a whole) perceives.[1195]

In general, this conception of interpretation concerns "rational activity giving meaning to a legal text," and this should be perceived as both the principal and the most important tool a court possesses.[1196] As was explained, interpretation concerns a process whereby the legal meaning of a text is extracted from its semantic meaning. In interpreting a legal text, the interpreter thus transforms static law into dynamic law.[1197]

Barak argued that in purposively interpreting a legal text, judges must take into account the values underlying the legal system and interpret a text, depending on its content, objectively, in order to reveal its true meaning in contemporary society. Furthermore, he mentioned that such texts must not be interpreted on their own but in light of the broader legal instruments.

The pragmatic and realist approach purposively interpreting the Convention in a way in which culture plays a central role, as used by the Inter-American Court in Awas Tingni v. Nicaragua and later cases, offers a good example of the

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1193 ACHPR, 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 4th February 2010.

1194 See, e.g. Lixinski L, 'Treaty Interpretation by the Inter-american court of Human rights: Expansionism at the Service of the Unity of International Law', *EJIL*, Vol. 21 no. 3, 2010, pp. 603- 604. Lixinski argues that this exercise in expansionism that the Court employs eventually contributes to the unity of international law.

1195 Barak A, *Purposive Interpretation in Law* (Princeton University Press, 2005), p. xv.

1196 Barak, 2006, p. 122.

1197 Barak, 2006, p. 123.

importance for human rights courts to engage in purposive judicial law making. It illustrates that in order to bridge the gap between law and society, human rights instruments must be regarded as dynamic texts, as living instruments that are able to adapt to changing societal circumstances.

The realist model is traditionally contrasted with a formalist approach. The latter interpreted the rights of indigenous peoples with fixed rules and positive application, while the former emphasizes a contextual interpretation of human rights norms as it applies to a specific set of problems.[1198] Anaya has explained and summarized that this realist model establishes three interpretative principles that are widely accepted in international adjudication.[1199] First, human rights provisions are to be interpreted in light of the overall context and object of the instrument of which they are a part. Secondly, the larger body of relevant human rights norms is to be taken into account and thirdly, they are to be interpreted in the manner that is most advantageous to the enjoyment of human rights. [1200] The last principle is also known as the "pro homine principle" as discussed earlier on in this part. The cases discussed in these paragraphs served as good examples of how these principles were applied in actual cases.

This realist or evolutionary method of the Court serves to *develop* international human rights law so as to give it meaning in the contemporary struggles of indigenous peoples. It focuses on real-life problems faced by different indigenous and tribal communities in the Americas. The Court's interpretive exercise underlines its willingness to take into account a divergence of concepts that is necessary to protect the physical and cultural survival of vulnerable groups from violations of their rights to self-determination and inherently, their rights to freely enjoy their traditionally occupied territories.

Universalistic Approach

While the starting point for human rights protection is the national system, regional human rights tribunals have an important complementary role.[1201] As was argued earlier, this is certainly the case for indigenous peoples, since the state is often the violator of their asserted rights and is not in the position to act as an independent mediator in conflicts between states and indigenous communities.[1202]

1198 Hopkins J, 'The Inter-American System and the Rights of Indigenous Peoples: Human Rights and the Realist Model', in: Richardson (ed.), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart, 2009), pp. 140-141.

1199 Anaya S J, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', Colorado Journal of International Environmental Law and Policy 16, 2005.

1200 Anaya S J, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', Colorado Journal of International Environmental Law and Policy 16, 2005.

1201 Killander M, 'Interpreting Regional Human Rights Treaties', SUR - International Journal on Human Rights, v. 7, n. 13, dec. 2010, p. 163.

1202 Remember the criticism on Tully's 'Strange Multiplicity' in which the State has the role of mediator in conflicts over cultural recognition.

The Inter-American Court ascribes autonomous meaning to the provisions in the Convention, independently from how a particular term is defined nationally.[1203] By means of the "living instrument doctrine" the Court recognizes that its provisions are not static and that their content and scope may change over time. But the Court is also aware that its judgments have a profound effect on broader international law and that they are involved in a judicial dialogue that affects other regional or international legal systems.

The human rights entities of the OAS generally follow a *universalistic approach*, relying heavily on other international sources like UN treaties and opinions or reports from UN human rights mechanisms and experts. The UN bodies, in turn, frequently cite the opinions and judgments of the Inter-American Court. As such, the Court and Commission also aim to develop international law outside the OAS region by making its reasoning consistent with broader international law. This way, the jurisprudence of the IACtHR may have beneficial effects for indigenous rights outside of its jurisdiction, in other regions.

The Inter-American mechanisms and their decisions have been cited by the ECtHR, albeit not in relation to decisions involving indigenous peoples.[1204] The Inter-American Court and Commission more frequently cite the judgments of the European Court, and the African Commission on Human and Peoples' Rights often relies on reasoning by both the ECtHR and the IACtHR.[1205] One of the decisions of the African Commission is of particular interest to this study: *Endorois v. Kenya*. This decision will be discussed in more detail below.

This (quasi) judicial dialogue between different regional and international platforms is necessary for the creation of a coherent system of international law for indigenous peoples. Furthermore, sharing arguments and reasoning leads to stronger normative roots and increased legitimacy, while at the same time it exposes the difficulties that diverging contexts may bring. As mentioned, there is one recent and very relevant example of this judicial dialogue regarding FPIC and indigenous rights.

V.1.2.6.2 Regional Diffusion of the Inter-American Approach: The African Commission on Human and Peoples' Rights in Endorois v. Kenya

In 2008, the African Commission on Human and Peoples' Rights issued its decision in the case between the Endorois Community and the State of Kenya.[1206] It is the leading example of how the Inter-American system of property and

[1203] Killander M, 'Interpreting Regional Human Rights Treaties', SUR - International Journal on Human Rights, v. 7, n. 13, dec. 2010, p. 163.
[1204] Killander M, 'Interpreting Regional Human Rights Treaties', SUR - International Journal on Human Rights, v. 7, n. 13, dec. 2010, p. 154.
[1205] Killander M, 'Interpreting Regional Human Rights Treaties', SUR - International Journal on Human Rights, v. 7, n. 13, dec. 2010, p. 154.
[1206] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010.

participation rights affects other jurisdictions within the context of regional human rights protection,. The case will be examined here to illustrate how the African Commission used this system.

The complainants, the Centre for Minority Rights Development and Minority Rights Group International on behalf of the Endorois Welfare Council, submitted a claim before the African Commission on Human Rights on May 22, 2003. The Endorois people traditionally inhabited the Lake Bogoria area in the Rift Valley province in Kenya. Approximately 400 families belong to the community, which had practiced pastoralism in said area from time immemorial.

In 1973, the gazetting of the area as a game reserve resulted in the eviction and relocation of the community. Furthermore, the complainants alleged that concessions for ruby mining on Endorois traditional lands were granted to a private company in 2002. The community was never consulted prior to declaring the region as protected area. They were displaced to semi-arid land, which proved to be inadequate for sustaining their livestock. Moreover, their access to Lake Bogoria, which is important to them for religious and cultural purposes, was denied and attempts to access the area were met with harassment and intimidation. In addition, the complainants claimed that there was no proper compensation given to the community for the loss of their traditional territory.

The Complainants alleged that the displacement of the Endorois community from their ancestral lands entailed a violation of their rights, as enshrined in the African Charter. The allegations included the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral way of life and violations of the right to practice their religion and culture, as well as the disruption of the overall process of development of the Endorois people. They claimed that the Government of Kenya has violated the Endorois community's religious freedom (Article 8), its right to property (Article 14), cultural rights (Article 17 (2) & (3)), the right to natural resources (Article 21), and the right to development (Article 22).[1207] The Community firstly claimed restitution of their land, with legal title and clear demarcation, and secondly compensation to the community for all the loss they have suffered through the loss of their property, development and natural resources, but also freedom to practice their religion and culture.

Although the *Endorois* decision includes a number of interesting statements relevant to indigenous rights, the focus in this paragraph will be on the rights to *property*, *resources* and *development*, since in the Inter-American Court has most

[1207] African (Banjul) Charter on Human and Peoples' Rights, Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force, October 21, 1986. African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraphs 1-22.

profoundly influenced the decision of the African Commission these areas and it is with respect to these rights that participatory rights are involved.[1208]

Regarding the land rights of indigenous communities in Africa, the Commission's Working Group of Experts on Indigenous Populations had already stated in its 2005 report that land rights are probably the most important of the indigenous issues since: "The protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa."[1209]

With regard to the *right to property*, protected by Article 14 of the Charter, the Commission stated that it would first look into its own jurisprudence, and then into international case law.[1210] While the Endorois did not have a registered property title to their lands, the Commission made clear – referring to *Awas Tingni* – that possession should suffice for an indigenous community to obtain official recognition of that property.[1211] The Commission emphasized that the state does not only have the duty to respect that right but also to protect it.[1212]

The Commission continued with its analysis using the Inter-American Court's reasoning. It explained that in Saramaka the failure to recognize an indigenous or tribal group becomes a violation of the right to property and quoted the Court: "This controversy over who actually represents the Saramaka people is precisely a natural consequence of the lack of recognition of their juridical personality."[1213] Quoting Saramaka again, the Commission stated that lack of clarity on this issue should not be an insurmountable obstacle, since the State has a duty to consult with the community.[1214]

[1208] *Cf.* Doyle C and Gilbert J, 'Indigenous peoples and globalization: from development aggression to self-determined development', European Yearbook on Minority Issues 219, 2011.

[1209] Gilbert J, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights', International and Comparative Law Quarterly, Vol. 60, 2011, p. 258.

[1210] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 186.

[1211] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 190.

[1212] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 191. The Commission refers to the *Mauritania Cases,* African Commission on Human and Peoples' Rights, Malawi African Association and Others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, 2000.

[1213] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 192, quoting the Saramaka case.

[1214] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 195.

The Kenyan State had argued earlier that special treatment in favor of the Endorois might be discriminatory but the Commission referred to *Awas Tingni*, *Sawhoyamaxa*, *Moiwana*, *Yakye Axa,* and *Saramaka* to confirm that: "Special measures of protection are owed to members of the tribal community to guarantee full exercise of their rights".[1215] The Commission furthermore referred to a number of other international instruments and cases that confirmed that such special measures may be necessary and stated that: "It is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination."[1216]

The Commission continued to assert that the Saramaka reasoning was fully applicable to the Endorois case, and that only *de jure* ownership of the land could effectively protect indigenous peoples.[1217] The Commission affirmed that the IACtHR's criteria were now internationally recognized norms and stated that delimitation and demarcation of the territories in consultation with the Endorois was necessary before granting the community official title.[1218] It then summarized the Inter-American jurisprudence and applied it to the situation of the Endorois:

> In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorized under this last conclusion. The African Commission thus agrees that the land of the Endorois has been

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[1215] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 197, quoting Saramaka.

[1216] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraphs196 and 198.

[1217] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 205.

[1218] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 206.

> encroached upon.[1219]

The Commission obviously respected the Inter-American system and acknowledged that it has a wider application than just the OAS region. But the Commission even went further and applies the entire Saramaka system of FPIC to the case of the Endorois. It argued, regarding the alienation of the Endorois lands by the Kenyan State, that: "In terms of consultation, the threshold is especially stringent in favor of indigenous peoples, as it also requires that *consent* be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate - ultimately results in a violation of the right to property."[1220] The Commission proceeded by describing the Saramaka safeguards - effective participation, benefit sharing and ESIA's - and confirmed that these are necessary to guarantee that restrictions on indigenous property rights do not lead to a denial of their survival. Based on these criteria, the Commission concluded, in maybe the most important paragraph of the decision, that:

> In the instant case, the African Commission is of the view that no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a prior environment and social impact assessment was not carried out. The absence of these three elements of the "test" is tantamount to a violation of Article 14, the right to property, under the Charter. The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the Game Reserve (or other adequate forms of compensation) also extends to a violation of the right to development.[1221]

This paragraph comprises the full Saramaka test, applied to an indigenous group in Africa. The Commission was unambiguous is asserting that failure to uphold the requirements was "tantamount" to a violation of the right to property. Furthermore, failure to secure effective participation (and compensation) also led to a violation of the right to development. Although the right to development is a particular right in the African Charter, it is obviously connected with the right to

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[1219] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 209. The Commission almost literally cited the IACtHR in Sawhoyamaxa, discussed earlier in this paragraph.

[1220] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 226.

[1221] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 228.

self-determination for indigenous peoples, as discussed earlier in this study.[1222] Self-determination is about the right for peoples to choose their pace and path of development and a lack of effective participation amounts to a denial of self-determination. Later on in this paragraph, the right to development and its relation to participation will be further discussed.

In the issue of property rights the Commission endorsed the Inter-American System from Awas Tingni to Saramaka, and acknowledged that under current international law this is the way to protect indigenous peoples' lands. It concluded that the encroachment on the property of the Endorois people is disproportionate and not in accordance with international law, and that therefore the Endorois had suffered a violation of Article 14 of the African Charter.[1223]

With regard to the connected issue of resources (Article 21 of the Charter), the Commission again relied on the *Saramaka* reasoning. The Commission acknowledges the IACtHR's view that the cultural and economic survival of indigenous and tribal peoples and their members depends on their access and free use of the natural resources in their territories.[1224] It further agreed with the Court's argument in *Sawhoyamaxa* and *Yakye Axa* that: "Members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have the right to own the land they have traditionally used and occupied for centuries." [1225] While also acknowledging that the right to property and its connected right to resources is not absolute, the Commission did find that Kenya had violated Article 21 of the Charter, as the Endorois never received adequate compensation or restitution of their lands.[1226]

While in the Inter-American System the scheme for the protection of indigenous land rights is primarily based on the right to property, in the African Charter it is also based on the *right to development* (Article 22 of the Charter). Participation and involvement in development projects are important and it is therefore that a lot of the reasoning in Endorois in relation to participation rights and FPIC is linked to Article 22.

[1222] On the connection between the right to development and self-determination, see: Doyle C and Gilbert J, 'Indigenous peoples and globalization: from development aggression to self-determined development', European Yearbook on Minority Issues 219, 2011.

[1223] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 238.

[1224] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 260.

[1225] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 260.

[1226] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraphs 265-268.

In this respect, the African Commission quoted the UN Declaration on the Right to Development which states that the right to development includes active, free and meaningful participation in development.[1227] The Commission asserted that the issue of participation is closely allied with the right to development and proceeded to analyze if the norms regarding effective participation and FPIC were upheld.

The Commission cited *Saramaka* and states that there is a duty to consult with respect to development or investment plans in indigenous territories. Furthermore, the Commission followed *Saramaka* in stating that the consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.[1228] It then proceeded to apply the FPIC criteria on the case at hand:

> In the instant Communication, even though the Respondent State says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the Respondent State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction. The Respondent State did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle. The African Commission agrees that the Complainants had a legitimate expectation that even after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes – the reason, in fact why they are in front of the African Commission.[1229]

The Commission tested the different elements of FPIC and concludes that they have not been respected in the present case. Subsequently, it quite literally adopted the important viewpoint from Saramaka that:

> Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty **not only to consult with the community, but also to obtain their free,**

[1227] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 283.

[1228] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 289.

[1229] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 290.

> **prior, and informed consent**, according to their customs and traditions.[1230]

The Commission agreed with the Complainants that the State did not ensure that the Endorois were accurately informed of the nature and the consequences of the process, which is a minimum requirement from the Dann Sisters case, which was discussed earlier in this part.[1231] The case for FPIC was also supported with arguments from the UN Special Rapporteur, who stated that free, prior, and informed consent is essential for the protection of human rights of indigenous peoples in relation to major development projects.[1232] Furthermore, the Commission argued that the Committee on the Elimination of Racial Discrimination had recommended that both the equitable sharing of benefits and the securing of prior informed consent were essential when such projects are planned on indigenous territories.[1233] The Commission concluded with regard to the case of the Endorois that:

> The African Commission is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained.[1234]

The Commission's analysis of the participatory requirements reveals the problems with FPIC that have been described throughout this study and emphasized why it is so important that consent or consultations are conducted in a manner that can

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[1230] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 291. Emphasis added.
[1231] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 292.
[1232] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 293.
[1233] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 296.
[1234] African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm no. 276 / 2003, 2010, paragraph 297.

be qualified as "free, prior and informed." The Endorois had highlighted in their complaint that illegitimate consultations had taken place and that the authorities had selected individuals to 'lend their consent' on behalf of the Endorois.[1235]

Eventually this led the Commission to conclude that the right to development was also violated and stated in its recommendations that Kenya had to recognize rights of ownership to the Endorois and restitute Endorois ancestral lands, ensure unrestricted access to Lake Bogoria, and pay adequate compensation to the community for the loss suffered. Furthermore, the State had to engage in a dialogue with the community to implement the Commission's recommendations.

In conclusion, Endorois v. Kenya is an important decision for a number of reasons. It is the leading example of the aforementioned "judicial dialogue" because the Commission relied on the jurisprudence of the IACtHR. In doing so it recognized that the Court's system is part of international human rights law. This way, the decision not only affirms that the Inter-American system is applicable to a wider context - which is in line with the mentioned universalistic approach of the OAS human rights entities - but also enforces the persuasive power of the Court's reasoning. Additionally, the decision is also of importance to the OAS area, since it affirms that the system is applicable in different contexts.[1236]

Furthermore, it is the first time that the FPIC criteria, as developed foremost in *Saramaka*, were applied in another international platform. The Commission's analysis of the FPIC and effective participation requirements in Endorois highlighted the importance of *"free, prior and informed"* consultation and consent processes and is an important step in the legal development of FPIC.[1237] The importance of effective participation and FPIC in relation to self-determined development and control over land and resources is firmly acknowledged in the Commission's decision.

V.1.3 Conclusions and Recapitulation: The OAS System, International law and FPIC

The judgments and decisions discussed offer the most elaborate account of how indigenous lands rights are legally structured and justified, and how they are to be implemented. Effective participation and FPIC are seen as essential tools for indigenous peoples to regain or maintain control over their lands and natural resources. The focus has been on the Inter-American human rights system, since

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1235 Gilbert J, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights', International and Comparative Law Quarterly, Vol. 60, 2011, p. 265.

1236 And therefore may diminish reluctance on the part of OAS member States to implement the Court's orders with regard to indigenous and tribal property rights and FPIC.

1237 Agreeing with Jérémie Gilbert, who argues that: "The adoption of the right to FPIC by the Commission is important since it is an area of the law where there is little legal adjudication." Gilbert J, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights', International and Comparative Law Quarterly, Vol. 60, 2011, p. 267.

it is within this framework that the most elaborate explanation of FPIC and its connection to effective participation, land, and resource rights can be found.

Early Cases

In the groundbreaking *Awas Tingni* case, the Court developed its justification of indigenous land rights, based on the right to property. The Court stressed the vulnerable and special position of indigenous peoples and the need for special protection. Delimitation, demarcation, and titling of traditional lands are required in order to respect communal land rights.[1238] Importantly, possession of the territories involved is regarded as sufficient proof of ownership.[1239] In creating a "hard" system of property rights for indigenous peoples the Court aimed to shield communities from outside interference, but it may have some negative consequences as well.[1240] Nevertheless, it is clear that without legal title to their lands, indigenous communities are often left without a say and at the discretion of States.

Building on this doctrine, the Commission started to explain the concept of FPIC in the *Dann* case. As described earlier, consent, when given free, prior and informed, serves as a safeguard for protecting indigenous lands and resources. Consent has to be acquired on behalf of the community as a whole, and this entails at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as a collective. In this way, the Court and Commission also distinguish between an internal and an external dimension in which FPIC is applied, as was discussed in the paragraphs on self-determination. Consent of the community as a whole clearly indicates the relation between the collective entity – the indigenous people - and the larger political order (the state) that has to obtain consent. The requirement that there has to be optional participation for all individual members of this community refers to the internal dimension, entailing participatory standards as necessary in determining the consent or non-consent of the community as a collective. As discussed in Part III this is a difficult issue, where on the one hand it is up to the community itself to decide how it is represented, while on the

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[1238] Nevertheless, creating such a 'hard' property notion may also lead to conflicts and may not suit a variety of situations, for instance when lands have traditionally been shared or in the case of nomadic communities. Furthermore, it may be at odds with indigenous conceptions of 'property'.

[1239] This is a very practical and important consideration, where in other cases and situations, indigenous peoples have often been confronted with a very demanding burden of proof. This has led to unfair situations in which indigenous communities had to provide 'western' style legal proof of their relation to their lands, while custom and oral traditions were regarded as insufficient.

[1240] Requiring 'hard' boundaries and agreements about land use may lead to various conflicts as discussed earlier this study in the paragraphs on overlapping interests. Property rights could maybe best be seen a 'bundle of rights' entailing different competences and responsibilities. These could be negotiated in FPIC processes and agreements.

other hand participation of vulnerable groups within the community is a prerequisite. These demands might collide in some circumstances.[1241]

In the *Belize* report, the Commission reaffirmed the communal land tenure doctrine and the criteria for FPIC as developed in the Dann decision. In addition, the Commission explicitly recognized the importance of the principle of self-determination for indigenous peoples, thereby grounding and justifying FPIC on the basis of two notions of self-determination and the collective right to property over traditional lands.

In *Moiwana, Yakye Axa,* and *Sawhoyamaxa* the Court explained that restitution of ancestral lands should also be made possible, but that the right to property is not absolute and that it may be limited if those restrictions proposed are established by law, necessary, proportional and have the aim of attaining a legitimate goal in a democratic society.

Saramaka

In the *Saramaka* case the view developed in the preceding decisions was restated the system of property and participation rights was also significantly expanded.[1242] The Court is guided by the UN Declaration on the Rights of Indigenous Peoples and referred to and explained FPIC. The Court expanded its safeguards for limiting the right to property in creating three criteria related to development plans and the implementation of FPIC processes.

In addition to the limitation clause mentioned above, the State must ensure effective participation of the affected people. As was explored in-depth, effective participation entails rights to consultation and consent and the elements of FPIC aim to secure that participation is indeed effective. The State must also guarantee a reasonable benefit for the affected people in relation to development plans on their territory. This implies that the State has to engage in benefit sharing consistent with the just compensation clause of Article 21. The Court explained that benefit sharing should be understood "as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Saramaka people."[1243]
Finally, he State must ensure a prior environmental and social impact assessment. The Court stated that these ESIA's must conform to the relevant international standards and best practices and must take account of the cumulative impact of

[1241] Fortunately, a lot of attention is given in UN context to the position of vulnerable groups within indigenous communities, like women and youth.
[1242] Also see: N Bankes, 'The protection of the rights of indigenous peoples to territory through the property rights provisions of international regional human rights instruments' (2011) draft. & Bankes N, 'International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples', 47, Alberta Law Review, 2010.
[1243] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*, paragraph 140.

existing and future activities.[1244] Highly significant is the Court's unambiguous affirmation that obtaining consent is deemed mandatory when large-scale development projects have a significant impact on indigenous peoples and their lands and territories.[1245]

As long as indigenous territories have not been demarcated and titled, the State also has to abstain from activities on these territories unless it obtains the community's FPIC. The Court explained that a proper conception of indigenous peoples land rights comprises the notions of culture, self-determination, consultation, and consent.[1246] The Saramaka judgment led to an increase of studies on participatory rights which have led to a further clarification of rights to consultation and consent.

The report of the Special Rapporteur on the Rights of Indigenous Peoples is highly instructive in this respect. Anaya explained that the two core issues are land titling and consultation processes and that, although there is not one formula for implementation, both must adhere to certain minimum standards.

With respect to the *land titling process*, Anaya explained that such procedures have to entail at a minimum (a) identification of the area and rights that correspond to the indigenous or tribal community, or group of communities, under consideration, (b) resolution of conflicts over competing uses and claims, (c) delimitation and demarcation, and (d) issuance of title deed or other appropriate document that clearly describes the nature of the right or rights in lands and resources.[1247]

Consultation and FPIC

The Special Rapporteur explained that *consultation processes* must take place at the earliest possible stages, which means "prior" in the sense that indigenous communities have ample time to internally discuss the proposals. Furthermore, Anaya stated that these ought to be a genuine dialogue and more than just the provision of information. It was discussed at length in the paragraphs on information and communication why FPIC processes must be conceptualized as

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1244 N Bankes, 'The protection of the rights of indigenous peoples to territory through the property rights provisions of international regional human rights instruments' (2011) draft, p. 57 ff.

1245 The Court and Commission, as described earlier, do not autonomously invent this regime of FPIC, but build on the elements of such a principle as explained in the former paragraphs of this study. The Court also required FPIC in situations where the land rights of indigenous or tribal communities have not been legally guaranteed. The Court and Commission are developing a methodology on FPIC that emphasizes the interrelationship between self-determination and communal property rights.

1246 *Cf.* Page A, 'Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System', Sustainable Development, Law and Policy 16, 2004, page 19.

1247 A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 36.

communicative transactions and not merely as transfers of information between different agents.

Anaya explained that consultation and consent processes must be carried out with due regard for indigenous peoples' traditional decision-making institutions and respect for their customs. These elements were also discussed earlier. In part III the importance and prerequisites of such an intercultural dialogue were explored. James Tully explained that mutual recognition, continuity and consent should be guiding if such a dialogue is to be successful. The legal reasoning examined in this paragraph is in line with this, without legal or juridical recognition there is no basis for dialogue, and only a stable dialogue in which consent is the guiding principle can lead to adequate and mutually beneficial arrangements between indigenous peoples and States or other actors regarding land and resource rights.

Furthermore, the consultations must be in good faith; they must be "free." As was stated in Part III of this study, this means that the dialogue takes place in a situation in which indigenous groups enjoy discursive control and have their say without being subjected to any form of hostile coercion. The fundamental goal of these processes is to "provide security for land and resource rights in accordance with indigenous and tribal peoples' own customary laws and resource tenure."[1248] Control over land and resources in combination with fair participatory structures is a prerequisite for indigenous communities to exercise their right to self-determination.

The Court stated that consultation is always necessary, but that it is vital with respect to the following issues:

> In this regard, the Judgment orders the State to consult with the Saramaka people regarding at least the following six issues: (1) the process of delimiting, demarcating and granting collective title over the territory of the Saramaka people; (2) the process of granting the members of the Saramaka people legal recognition of their collective juridical capacity, pertaining to the community to which they belong; (3) the process of adopting legislative, administrative, and other measures as may be required to recognize, protect, guarantee, and give legal effect to the right of the members of the Saramaka people to the territory they have traditionally used and occupied; (4) the process of adopting legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs; (5) regarding the results of prior environmental and social impact assessments, and (6) regarding any proposed restrictions of the Saramaka people's property rights, particularly regarding

[1248] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 36.

> proposed development or investment plans in or affecting Saramaka territory.[1249]

The Court explicitly stated that these criteria are not only applicable to the Saramaka case but also to any other indigenous or tribal people that is affected by development or investment projects. As such, the Court clearly indicated that Saramaka is to be an important precedent.

The fundamental goal of consultation and FPIC processes is to "provide security for land and resource rights in accordance with indigenous and tribal peoples' own customary laws and resource tenure."[1250] The Special Rapporteur's report is a welcome addition to the Court's reasoning because it offers a detailed explanation on how to implement the Inter-American system on indigenous peoples land, resource, and participation rights. The Surinamese case is particularly illustrative, since no adequate legal framework on indigenous rights exists.

Following the Saramaka case, the Court has decided two more cases on indigenous property and participation rights. The 2012 *Sarayaku* case is especially important for this study, since the system and importance of the right to consultation is analyzed and the Saramaka FPIC criteria are confirmed. The Court emphasized that consultation should not be seen as a mere formality but as a true instrument of participation, responding to the ultimate goal of establishing a dialogue between the parties based on principles of mutual trust and respect, and with the aim of reaching consensus.[1251] Consultation rights are vital with respect to protecting both communal property and the cultural identity of indigenous peoples.

Judicial Interpretation and Dialogue

Since these paragraphs focused mainly on the jurisprudence of the IACtHR, an important question is what the effect of these cases is on general international law or on other regional human rights systems. When the judicial reasoning is quoted and followed elsewhere it is important sign that the Inter-American System becomes authoritative in other jurisdictions.

The Inter-American Court applies a dynamic or evolutionary method of interpreting human rights provisions and adheres to a universalistic approach. This means that human rights provisions are to be interpreted in light of the

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[1249] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs)*, pp. 5-6.

[1250] A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname, paragraph 36.

[1251] Again clearly reflecting the argumentation of part III of this study, most prominently (a) an agreed upon form of mutual recognition, (b) continuity of relationship and (c) consent as prerequistite for alteration of the relationship or present arrangements.

overall context and object of the instrument of which they are a part. Moreover, the larger body of relevant human rights norms is to be taken into account and they are to be interpreted in the manner that is most advantageous to the enjoyment of human rights.[1252] The cases discussed in these paragraphs served as good examples of how these principles were applied in actual cases. The approach of the IACtHR illustrates that in order to bridge the gap between law and society, human rights instruments must be regarded as dynamic texts, as living instruments that are able to adapt to changing societal circumstances.

Endorois v. Kenya is the leading example of the aforementioned "judicial dialogue" since the African Commission on Human and Peoples' Rights relies on the jurisprudence of the IACtHR. In doing so the Commission recognizes that the Court's system is part of international human rights law. This way, the decision not only clarifies that the Inter-American system may be applicable to a wider context but also increases the persuasiveness of the Court's reasoning.

Furthermore, it is the first time that the FPIC criteria, as developed foremost in *Saramaka*, are applied and adjudicated by another human rights body. The Commission's analysis of the FPIC and effective participation requirements in Endorois underline the importance of *"free, prior and informed"* consultation and consent processes and is an significant step in the legal development of FPIC.[1253] The importance of effective participation and FPIC in relation to self-determined development and control over land and resources is firmly acknowledged in the Commission's decision.

Property Rights and FPIC: Legal Outline

The Inter-American Human Rights entities offer the most elaborate explanation of what FPIC legally amounts to. Effective participation is essential when it comes to protecting indigenous peoples' lands and resources.[1254] Moreover, in the OAS jurisprudence it is clarified that this entails that consultation and consent are vital in order to secure indigenous peoples' control over their lands and resources, as an important component of their right to self-determination.

Communal property rights are not absolute and can be restricted in the interest of society if the restriction is (a) previously established by law, (b) necessary, (c) proportionate, and (d) with the aim of achieving a legitimate objective in a democratic society. Additionally, when indigenous property rights

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[1252] Anaya S J, 'Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend', Colorado Journal of International Environmental Law and Policy 16, 2005.

[1253] *Cf.* Gilbert J, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights', International and Comparative Law Quarterly, Vol. 60, 2011, p. 267.

[1254] Also see: Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 34, 28 June 2007, Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia. & Follow-up report to OEA/Ser.L/V/II. Doc. 34, 28 June 2007, Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia. Inter-American Commission on Human Rights, 2009.

are at stake, a proposed limitation may not amount to endangering their physical or cultural survival. Therefore, when considering a limitation, the state must (a) ensure the effective participation of the community concerned, (b) guarantee a reasonable benefit from the proposed project, and (c) perform prior ESIAs.

Consultation with indigenous peoples should always have the purpose of obtaining FPIC, and to ensure that such participation is "effective" it should be in accordance with the requirements of "free, prior and informed."[1255] At a bare minimum this means that consultations are in good faith, commenced at the earliest stages of a planned project, and accurately informed. In this last respect the obligation to conduct ESIAs is highly relevant.

Consultation is not a single act, but concerns negotiations that require parties' good faith and are held with the objective of achieving a mutual agreement. FPIC processes therefore also entail responsibilities on the part of the indigenous peoples involved. As was described in the paragraphs on freedom, FPIC and mainly the element "free" are best conceptualized as fitness to be held *responsible*, which is possible in a discursively controlled position.

In such *co-responsible decision making processes*, States are always under the obligation to consult with indigenous peoples and guarantee their effective participation in decision-making regarding any measure that affects their territories.[1256] In Sarayaku, the Court reasoned that this obligation to consult has become a general principle of international law.[1257] Therefore, FPIC is *always* important when decisions affect indigenous communities. It is in these situations therefore not just a question of *when* FPIC is relevant but more *how* it should guide the consultation process. The right to – free, prior and informed – consultation is vital for securing rights to cultural identity and communal property, which are exponents of indigenous peoples' right to self-determination.[1258] Consequently, failure to respect the minimum requirements of consultation processes may lead to violation of indigenous peoples right to collective property and cultural identity.

[1255] *Cf.* Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 273.

[1256] Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 273.

[1257] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, par. 164. Also see: American Society of International Law, *The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku*, ASIL Insights, Vol. 16, Issue 35, November 28 2012.

[1258] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, primarily paragraph 217.

FPIC and effective participation are not limited to property rights but it is within this area that they are most important for indigenous peoples.[1259] Any administrative decision that may legally affect indigenous and tribal peoples' rights or interests over their territories should therefore be based on a process of full participation.[1260] This includes decisions concerning the natural resources within indigenous territories.[1261]

In some cases, obtaining consent becomes a mandatory requirement. This is the case when indigenous peoples are to be relocated, when hazardous materials are stored on (or in) their territories, and when large-scale development or investment projects may have a significant impact on them. This is often the case when such projects concern the extraction of natural resources.[1262] The obligation to consult or obtain consent is a responsibility of the state.[1263]

Of vital importance is the insight that FPIC processes concern both consent and consultation requirements. Consultation processes that do not aim to reach

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[1259] As explained at the beginning of this study, that is the reason why the focus is on indigenous peoples' rights to land and resources. In this area the problems concerning decision-making and consultation and consent provisions are most pressing.

[1260] Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 277.

[1261] Also see: Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 290: "Consequently there is a State duty to consult and, in specific cases, obtain indigenous peoples' consent in respect to plans or projects for investment, development or exploitation of natural resources in ancestral territories: States must "promote, consistent with their relevant international obligations, participation by indigenous peoples and communities affected by projects for the exploration and exploitation of natural resources by means of prior and informed consultation aimed at garnering their voluntary consent to the design, implementation, and evaluation of such projects, as well as to the determination of benefits and indemnization for damages according to their own development priorities." Through such prior consultation processes, indigenous and tribal peoples' participation must be guaranteed in all decisions on natural resource projects on their lands and territories, from design, through tendering and award, to execution and evaluation."

[1262] Also see: Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 283: "The duty of consultation, consent and participation has special force, regulated in detail by international law, in the realization of development or investment plans or projects or the implementation of extractive concessions in indigenous or tribal territories, whenever such plans, projects or concessions can affect the natural resources found therein."

[1263] Also see: Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 291: "Carrying out consultation procedures is a responsibility of the State and not of other parties, such as the company seeking the concession or investment contract. […] because corporate actors are, as a matter of definition, profit seeking entities that are therefore not impartial.

agreement are no genuine consultation processes. And consent, more specifically "free, prior and informed" consent, cannot be achieved without a fair consultation process. Distinguishing between consultation and consent processes is therefore highly counterproductive.

While the OAS jurisprudence offers the most comprehensive legal analysis of FPIC and offers a number of guidelines on how to implement FPIC processes, the Court, Commission, and UN Special Rapporteur also contended that the form of implementation is context dependent and that there is no "single formula" for consultations.[1264] In order to get a better picture of how such FPIC processes are to be shaped and implemented, the next paragraphs will look at a number of specific areas concerning voluntary sustainability initiatives in which FPIC requirements are embedded. The most comprehensive implementation models for FPIC processes can be found in this area.

V.2 Practices and Implementation of FPIC in Voluntary Environmental Protection Schemes

In the previous paragraphs of this study FPIC and participatory processes were mainly explored in terms of their justifications, international legal character, and status. In part II it was explained that the normative pedigree of FPIC is formed by rights to self-determination and corollary rights to lands and resources. In short, it was concluded that rights to lands and resources are essential to realize indigenous aspirations to be "self-determining" and that in order to implement those rights, there is a need for effective participatory mechanisms.

In Part III we explained these participatory structures and illustrated why they are so important in intercultural decision-making processes involving indigenous peoples. Here the *justifications* for FPIC were exposed. Furthermore, the different elements of FPIC – mainly free and informed – were examined and it was argued that respect for these procedural safeguards is key in concluding and maintaining constructive arrangements between indigenous peoples and other actors. The main goal: a genuine intercultural dialogue under conditions of mutual respect and trust is only to be achieved if FPIC leaves space for a flexible approach in which communicative processes take into account the cultural diversity that exists in multi-nation states. One of the most important ways to realize self-determination for indigenous peoples is a strong system of land and resource rights combined with participatory norms.

In Part IV of this study the international legal framework in which FPIC requirements are enshrined was traced, and it was concluded that although FPIC is becoming a key demand in a wide variety of instruments and platforms, not

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[1264] *Cf.* Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 301. & A/HRC/18/35/Add.7, 18 August 2011, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum, Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname.

much guidance on its implementation is available. Here contemporary *standard-setting* with respect to FPIC was explained, but not so much the way in which practical *implementation* is to be approached. Part V therefore contained an examination of primarily the OAS jurisprudence, since this is the framework in which the most advanced *legal* explanation of a system of property, self-determination, participation and consultation rights is to be found.

The present chapter will concern a deeper investigation into how this system of FPIC processes is to be implemented. Since there is not much further guidance on the level of general international law, a number of specific *voluntary initiatives* dealing with sustainable development are examined. However, this term does not imply that these systems have no legal value. On the contrary, the guidelines and protocols that will be scrutinized are very much influenced by international law and are by no means to be seen as detached from the international legal framework. Furthermore, the initiatives that are examined have an impact on how international law is explained. This was for instance the case in Saramaka, where the Court referred to the CBD's Akwé Kon guidelines on ESIAs and indigenous peoples that will be examined in the next paragraph.

In the following paragraphs the implementation of FPIC and FPIC protocols will be examined from a more specific angle. These voluntary initiatives, in which environmental law and the protection of indigenous or local communities is integrated, have a pioneer role. It will be illustrated that these voluntary initiatives are extremely important to reveal how FPIC processes are to be implemented.

These voluntary standards are a result of the growing recognition of the role and responsibilities that the private sector has in relation to the sustainable production of a number of commodities.[1265]

Noteworthy, at the UN level, the UN Guiding Principles for Business and Human Rights – the Ruggie Principles – illustrate that human rights protection is also a responsibility of private companies.[1266] The UN Guiding Principles seek to provide an authoritative global standard for preventing and addressing the risks of negative human rights impacts caused by the conduct of companies.[1267] They outline how states and companies ought to implement the UN "Protect, Respect and Remedy" Framework in order to manage the current challenges with regard to business and human rights. The function of the Principles is clearly explained in their introduction:

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the

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[1265] Colchester M, Chao S, Jiwan N, 'Securing rights trough commodity roundtables? A comparative review', Pre-Conference draft, Forest Peoples Programme, 2012, p. 5.
[1266] A/HRC/17/31, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011.
[1267] A/HRC/17/31.

> implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[1268]

In the Principles it is highlighted which steps states should take to promote respect for human rights. Furthermore a blueprint for companies is provided so that they may know how to respect those rights.[1269] Indigenous peoples are mentioned with regard to the application of international human rights in the commentary on Foundational Principle 12 and in relation to Operational Principles 5 and 26 in the context of the duty of states to protect, and in respect of effective domestic legal mechanisms.[1270] Certainly, adherence by states and companies to the Ruggie principles would be beneficial for indigenous communities that risk individual and collective human rights violations.

The protection of the human rights of indigenous peoples is one of the important and recurring themes when companies are engaged in resource extraction. Within the voluntary standards that are explored, FPIC is one of the key requirements for successful sustainable development projects.

Throughout this study, it was argued that FPIC processes need to be flexible, that we should not look for any uniform procedure and that there is "no single formula for success." Nevertheless, it was also argued that a number of guidelines and principles connected with such processes could be found. In this paragraph these different guidelines and FPIC protocols are studied and critically assessed. Firstly, the CBD Akwé Kon voluntary guidelines on impact assessments will be discussed.[1271] These guidelines are still very general in application but offer the most comprehensive scheme of an *integrated approach* to FPIC processes, in which cultural, environmental, and social impact assessments are included. As argued, the scope of the decision-making powers that indigenous peoples may have is contingent on the impact that the proposed activity or decision may have. The Akwé Kon guidelines were developed in the framework of Article 8(j) of the

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[1268] A/HRC/17/31, Introduction to the Principles, paragraph 14.

[1269] Press Release concerning the UN Guiding Principles on Business and Human Rights, available at: http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-press-release-24-mar-2011.pdf. Visited 3 February 2014.

[1270] A/HRC/17/31, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011, paragraphs 5, 12 and 26.

[1271] Akwé: Kon Guidelines: Voluntary guidelines for the conduct of cultural, environmental and social impact assessment regarding development proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. Adopted by the conference of the parties to the Convention on Biological Diversity at its seventh meeting, Kuala Lumpur, Malaysia, 9 - 20 February 2004, UN Document UNEP/CBD/COP/7/21. (p. 261-263). The Guidelines derive their name from a Mohawk term meaing 'everyting in creation' to emphasize the holistic nature of the instrument.

CBD, and it will be shown that they discuss the different elements of the land rights and participation model that the IACt.HR developed in Saramaka People v. Suriname.

Secondly, and more specifically, the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD) and its framework programme REDD+ will be discussed. REDD aims to create financial value for the carbon that is stored in forests. It offers incentives for developing states to reduce emissions from forested lands and invest in low-carbon alternatives for sustainable development. 'REDD+' takes this one step further, as the name suggests, and includes a wider framework of conservation, sustainable forest management and enhancement of forest carbon stock.[1272] In this setting one of the most elaborate models for implementing FPIC is being developed.

Thirdly, the role of FPIC within an even more specific area is examined: sustainable forest management. Very recently, the Forest Stewardship Council (FSC) - which aims to secure and promote sustainable forest management along the entire "chain of custody," has developed guidelines for the implementation of FPIC processes. This is a welcome development but also rather late, since informed consent requirements have been present within sustainable timber certification schemes for quite some time. Fourthly, a number of other voluntary initiatives, which include FPIC requirements to a minor extent, will be briefly explored.[1273]

Finally, a case study on the Orang Asli of Peninsular Malaysia and their experiences with FPIC and sustainable forest management will be used to illustrate that although FPIC criteria are enshrined in voluntary codes, their implementation may still be problematic. This case will illustrate how different overlapping legal and quasi-legal regimes may lead to undesirable and confusing situations to the detriment of the affected communities. Nevertheless the integration of environmental protection schemes and FPIC processes in voluntary initiatives offers the most comprehensive examination of how FPIC is to function in practice. The 'Orang Asli' case will illustrate how FPIC is (wrongly) applied in voluntary initiatives and what kind of issues arise at the intersection of national and international law.

In summary, it will be argued that the concrete implementation of FPIC procedures in an international setting is most elaborately dealt with in voluntary initiatives. Where legal reflections stop, specific guidelines and protocols of a more voluntary nature offer more concrete explanations of FPIC processes. The examination of these guidelines sheds light on a number of important issues that were discussed throughout this study.

[1272] *See* UN REDD website:
http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx.

[1273] The Roundtable on Sustainable Palm Oil, The Roundtable on Responsible Soy, The Roundtable on Sustainable Biofuels and the International Committee on Mining and Metals will be explored.

The goal of this paragraph therefore is to examine practical guidelines that may help clarifying the apparently difficult issue of implementing FPIC processes. In line with what is argued throughout this book, Gerard Persoon and Tessa Minter confirmed that FPIC is the best available mechanism for guaranteeing indigenous peoples' involvement, participation, decision-making and self-determination. However, the problem is that although FPIC is becoming a legal demand in more and more settings and documents, little research has been done on best practices and other forms of practical implementation.[1274]

The manner in which FPIC is to be implemented, as an international human rights concept, will vary from case to case.[1275] Nevertheless, a number of general principles is to be taken into account in every FPIC process. It will therefore be argued that implementation guidelines should for a large part be concerned with creating the right circumstances for developing a proper community protocol for the specific situation at hand, based on good faith, trust and discursive control. The central question in this paragraph is: "How could FPIC be implemented?"

V.2.1 Integrating Impact Assessments: The Akwé: Kon Guidelines

Article 8(j) CBD and the Adoption of the Guidelines

the CBD's Akwé Kon Guidelines provide one of the possible routes for implementing FPIC processes, entailing effective participation and ESIAs. This was suggested by the Inter-American Court in its interpretation judgment following Saramaka People v. Suriname[1276]Within the framework of the CBD it is recognized that biodiversity and culture are closely linked and interdependent.[1277] It is increasingly accepted that in order to respect this connection, it is necessary for communities to develop protocols and rules that articulate customary norms in forms that are understandable to others. For FPIC processes, these "community protocols" are of particular importance, since FPIC entails the inclusion of indigenous decision making structures in broader decision making processes. The

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[1274] Persoon G A and Minter T, 'Code of Conduct for working with indigenous and local communities', Tropenbos International, 2011. Persoon and Minter further argue that 5 simple questions will have to be answered with respect to FPIC: what is it? Who gives it? What is the proof that you have obtained it? And, who accepts this evidence. While these are indeed some of the most important questions that FPIC processes should take into account, they are not always that simple to answer, as was argued throughout this book.

[1275] As was described throughout this study, FPIC arrangements concern a wide – maybe the widest – variety of relations between individuals, communities and other actors.

[1276] Inter-American Court of Human Rights, Case of The Saramaka People v. Suriname, Judgment of August 12, 2008, *(Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs,* paragraph 41. The Court refers to the guidelines and states that the Akwé Kon Guidelines are one of the most comprehensive and used standards for conducting ESIAs in the context of indigenous and tribal peoples.

[1277] Swiderska et. al., 'Community protocols and free, prior and informed consent – overview and lessons learnt', International Institute for Environment and Development (iied), Participatory Learning and Action 65, 2012, p. 26.

essence of a successful FPIC process is that it is largely designed by the community. These ideas are reflected in the Akwé Kon Guidelines.

The Guidelines, drafted by the Secretariat of the Convention on Biological Diversity in 2004 and adopted by the Conference of the Parties at its seventh session that same year, are fully called: "Voluntary guidelines for the conduct of cultural, environmental and social impact assessment regarding development proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities."[1278] They provide an integrated approach for those situations in which certain projects are likely to affect indigenous peoples and their environment. As was discussed when examining the Saramaka case, the Inter-American Court agrees that environmental protection and participation rights of indigenous peoples ought to go hand in hand. Therefore, an examination of the suggested process in these voluntary guidelines is valuable in clarifying how FPIC is to be implemented.

The guidelines are developed in the framework of Article 8(j) of the CBD on "in situ conservation" which states that:

> Each Contracting Party shall, as far as possible and as appropriate: [...] Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

In Article 8(j) the need for taking into account indigenous traditional knowledge is emphasized and important elements of the land and participation rights model of the Saramaka judgment are enshrined. In the Article the need for participation and consent of indigenous peoples and the need for equitable benefit-sharing are mentioned. While Article 8(j) at first sight mainly concerns traditional knowledge, in the Akwé Kon Guidelines the scope of this article is broadened to include projects that may affect indigenous lands, waters and sacred sites.[1279]

[1278] Akwé: Kon Guidelines: Voluntary guidelines for the conduct of cultural, environmental and social impact assessment regarding development proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (henceforth: Akwé: Kon Guidelines). Adopted by the conference of the parties to the Convention on Biological Diversity at its seventh meeting, Kuala Lumpur, Malaysia, 9 – 20 February 2004, UN Document UNEP/CBD/COP/7/21.

[1279] Traditional knowledge is defined in the Akwé Kon Guidelines as: "The traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity." Akwé: Kon Guidelines, p. 7.

The Guidelines, developed by the working group on Article 8(j), were adopted by the Conference of the Parties (COP) with the idea that conducting impact assessments applying an integrated approach will increase the effectiveness of the involvement of indigenous - and local - communities. The COP also recognized that: "The effective participation, involvement and approval of indigenous and local communities will require close cooperation among these communities, as well as between all relevant actors, and the design of appropriate mechanisms."[1280]

Furthermore it was acknowledged that the implementation of the guidelines should be in tune with international law.[1281] An integrated and transparent process is needed in which the participation of indigenous peoples is promoted and in which sufficient time for assessment prior to the implementation of the development plans is allocated. The COP emphasized the different elements of FPIC in providing its arguments for adopting the Guidelines. It furthermore called for a universalistic approach in stating that it requested the Executive Secretary to: "Continue to liaise with relevant international organizations, multilateral environmental agreements and processes on impact assessments with a view to developing or enhancing synergies between, and ensuring coherence of, assessment methodologies and guidelines."[1282]

The aim of the Guidelines is therefore to develop an integrated approach in which participation, transparency, and international cooperation are promoted.

The Implementation Model of the Guidelines

In the Guidelines states are called upon to consider this model whenever developments are proposed that are likely to impact sacred sites, lands, and waters traditionally occupied by indigenous communities.[1283] Although the wording indeed reflects the voluntary nature of the guidelines, this statement is very similar to the text of Article 32 UNDRIP, which was also quoted in the Saramaka case. The introduction to the guidelines also suggests that its system should be flexible and adapted to suit the particularities of each development initiative.[1284]

The guidelines provide a collaborative framework in which governments, indigenous and local communities, decision-makers, managers, and other actors are able to support the full and effective participation of indigenous peoples and properly take into account the cultural, environmental and social concerns and interest of indigenous communities.[1285] The interrelationship of cultural, environmental and social elements is a central theme in the Guidelines.

The main phases in the implementation model are firstly, a preparatory stage, and secondly, the main stage in which impact analysis and assessments are conducted. The third stage concerns the reporting and decision-making phase, and

[1280] UNEP/CBD/COP/7/21, Seventh Conference of the Parties, 2004, p. 261.
[1281] UNEP/CBD/COP/7/21, Seventh Conference of the Parties, 2004, p. 262.
[1282] UNEP/CBD/COP/7/21, Seventh Conference of the Parties, 2004, p. 262.
[1283] Akwé: Kon Guidelines, p. 3.
[1284] Akwé: Kon Guidelines, p. 4.
[1285] Akwé: Kon Guidelines, p. 5.

finally, monitoring and environmental auditing is required.[1286] These phases are reflected in a ten-step plan which can be summarized as follows:

a) Notification and public consultation of the proposed development by the proponent;
b) Identification of indigenous and local communities and relevant stakeholders likely to be affected by the proposed development;
c) Establishment of effective mechanisms for indigenous and local community participation, including for the participation of women, the youth, the elderly and other vulnerable groups, in the impact assessment processes;
d) Establishment of an agreed process for recording the views and concerns of the members of the indigenous or local community whose interests are likely to be impacted by a proposed development;
e) Establishment of a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community;
f) Identification and provision of sufficient human, financial, technical and legal resources for effective indigenous and local community participation in all phases of impact assessment procedures;
g) Establishment of an environmental management or monitoring plan (EMP), including contingency plans regarding possible adverse cultural, environmental and social impacts resulting from a proposed development;
h) Identification of actors responsible for liability, redress, insurance and compensation;
i) Conclusion, as appropriate, of agreements, or action plans, on mutually agreed terms, between the proponent of the proposed development and the affected indigenous and local communities, for the implementation of measures to prevent or mitigate any negative impacts of the proposed development;
j) Establishment of a review and appeals process.[1287]

These steps are explained in detail throughout the guidelines. In the document also a number of concerns are highlighted that were raised in this study. Identifying the indigenous communities that are affected may be a difficult step. Furthermore, in the Guidelines it is indicated that capacity building and providing sufficient resources is key to successful implementation. In step (e) it is provided that a process may be needed in which indigenous peoples may have the option to accept or oppose a certain project. The cautious wording reflects that the scope of the decision-making authority that indigenous peoples have depends on the impact of the proposed project. Of course, this impact is to be assessed by going through the different steps in the Guidelines. In the steps the need for a review and appeals process is also mentioned, which is – as was discussed in Part III – also

[1286] Akwé: Kon Guidelines, p. 8.
[1287] Akwé: Kon Guidelines, pp. 8–9.

of vital importance. In the next paragraphs on the UN-REDD Programme and the Forest Stewardship Council the relevance of review and grievance mechanisms will also be noted.

FPIC processes do not end when parties have come to an agreement but should be open to revision in case unforeseen circumstances arise. In the guidelines it is confirmed that all the relevant information about the project and the impact assessments should be made available to organizations representing indigenous peoples and that their customary law should be taken into account.[1288]

Integration of Cultural, Environmental and Social Impact Assessments

The special relationship between indigenous peoples and the environment is taken into account in the Akwé Kon Guidelines. It is proposed that cultural, environmental, and social impact assessments should be integrated into a single process.[1289] Similar to the Inter-American Court's jurisprudence, consultation and consent processes should be perceived as holistic procedures through which indigenous peoples may come to a truly "free and informed" decision. In addition to Article 8(j), Article 14 of the CBD provides the general requirements for carrying out the assessments.[1290]

[1288] Akwé: Kon Guidelines, pp. 10-13.

[1289] Akwé: Kon Guidelines, p. 13.

[1290] UN Convention on Biological Diversity, 1992. Article 14 states that: 1. Each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures; (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account;
(c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate;
(d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and
(e) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.
2. The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.

> The Guidelines contain comprehensive definitions of the different necessary impact assessments. A *cultural impact assessment* is defined as:
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> A process of evaluating the likely impacts of a proposed development on the way of life of a particular group or community of people, with full involvement of this group or community of people and possibly undertaken by this group or community of people: a cultural impact assessment will generally address the impacts, both beneficial and adverse, of a proposed development that may affect, for example, the values, belief systems, customary laws, language(s), customs, economy, relationships with the local environment and particular species, social organization, and traditions of the affected community.[1291]

The cultural impact assessment (CIA) should identify all aspects of culture during the early phases of the process. Important elements highlighted in the Guidelines are: indigenous systems of resource use, places of cultural significance, customary law systems, patterns of land use, and political systems.[1292] In conducting the CIA due consideration is to be given to the protection and preservation of traditional knowledge and specific protocols should be established for particular kinds of developments like mining, tourism or forestry.[1293] As was discussed earlier, it is indeed vital to tailor the process to the kind of activity that is proposed or the nature of the right that may be violated.

Furthermore, it is emphasized in the Guidelines that there is a need for respecting cultural privacy and avoiding negative impact on sacred sites or ceremonial activities. An important issue is that the impact on the exercise of customary law should be carefully assessed.[1294] When development projects affect indigenous territories, it may be that an outside workforce is introduced, or that land tenure systems are altered, formalized, or disrupted. This may lead to conflicts, and negotiations to minimize violating customary law are essential.

An *environmental impact assessment* (EIA) is: "A process of evaluating the likely environmental impacts of, and proposing appropriate mitigation measures for, a proposed development, taking into account interrelated socio-economic, cultural and human health impacts, both beneficial and adverse."[1295]

In The Guidelines it is noted that both direct and indirect impacts should be carefully assessed, and a number of important elements of baseline-studies are summed up. It is also stated that traditional knowledge should be an important and

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[1291] Akwé: Kon Guidelines, pp. 6-7.
[1292] Akwé: Kon Guidelines, p. 13.
[1293] Akwé: Kon Guidelines, p. 14.
[1294] Akwé: Kon Guidelines, p. 15.
[1295] Akwé: Kon Guidelines, p. 7. It is beyond the scope of this study fully examine the scope of environmental impact assessments. Therefore only some key points from the Guidelines will be mentioned. This is also applicable for the exact scope and content of cultural and social impact assessments.

integral element of the baseline studies.[1296] "Informing" here has a double meaning, it is not only the EIA that may help indigenous communities to make an informed decision, but conversely it is also the knowledge and expertise of the indigenous communities involved that contributes to measuring the environmental impact of a proposed project. Especially in relation to the mentioned baseline studies, indigenous knowledge may be essential.[1297]
The *social impact assessment* (SIA) is described as:

> "A process of evaluating the likely impacts, both beneficial and adverse, of a proposed development that may affect the rights, which have an economic, social, cultural, civic and political dimension, as well as the well-being, vitality and viability, of an affected community – that is, the quality of life of a community as measured in terms of various socio-economic indicators, such as income distribution, physical and social integrity and protection of individuals and communities, employment levels and opportunities, health and welfare, education, and availability and standards of housing and accommodation, infrastructure, services."[1298]

Regarding development projects on indigenous territories, these assessments should be evaluated in relation to tangible benefits for the communities involved. These may be: job creation, access to markets, revenue-sharing, or diversification of income opportunities.[1299] However, the transition to different economical systems may also lead to an increase in crime, alcohol abuse, or sexually transmitted diseases. It becomes very clear why the Guidelines entail an integrated and holistic approach; the different cultural, environmental, and social factors all influence each other. In this respect, it is mentioned in the guidelines that when

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[1296] Akwé: Kon Guidelines, pp. 16-17.
[1297] The Guidelines refer to necessary information with respect to: (a) Species inventories (including identification of particular species important to the affected indigenous or local community as food, medicine, fuel, fodder, construction, artefact production, clothing, and for religious and ceremonial purposes, etc); (b) Identification of endangered species, species at risk, etc. (possibly referenced to the World Conservation Union (IUCN) Red Data Book, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and national inventories); (c) Identification of particularly significant habitat (as breeding/spawning grounds, remnant native vegetation, wild-life refuge areas including buffer zones and corridors, habitats and routes for migratory species) and crucial breeding seasons for endangered and critical species; (d) Identification of areas of particular economic significance (as hunting areas and trapping sites, fishing grounds, gathering areas, grazing lands, timber harvesting sites and other harvesting areas); (e) Identification of particularly significant physical features and other natural factors which provide for biodiversity and ecosystems (e.g. watercourses, springs, lakes, mines/quarries that supply local needs); and (f) Identification of sites of religious, spiritual, ceremonial and sacred significance (such as sacred groves and totemic sites).
[1298] Akwé: Kon Guidelines, p. 7.
[1299] Akwé: Kon Guidelines, p. 17.

determining the scope of the SIA, at least the following points should be taken into account:

(a) Baseline studies;
(b) Economic considerations;
(c) Possible impacts on traditional systems of land tenure and other uses of natural resources;
(d) Gender considerations;
(e) Generational considerations;
(f) Health and safety aspects;
(g) Effects on social cohesion;
(h) Traditional lifestyles; and
(i) The possible impact on access to biological resources for livelihoods.[1300]

The Guidelines provide a detailed analysis of each of these points. The document refers to the particularly large impact that development projects may have on subsistence based communities. Furthermore, the impact on resource and land tenure and the effects on the social cohesion and health of communities affected are areas of ongoing concern.[1301]

As is correctly argued in the Akwé Kon Guidelines, it is only when an integrated approach is followed – comprising assessments of the impact of environmental, social-economic and cultural elements – that a clear view of the overall impact of development projects on indigenous territories can be acquired. This integrated approach can only be successful when community participation is respected and promoted throughout the process.

General Principles: FPIC and Self-determined Development

The Guidelines furthermore provide for a number of general considerations that should guide the impact assessments. Prior informed consent is mentioned. The Akwé Kon Guidelines elaborate on FPIC in paragraph 53, cited here in full:

> Where the national legal regime requires prior informed consent of indigenous and local communities, the assessment process should consider whether such prior informed consent has been obtained. Prior informed consent corresponding to various phases of the impact assessment process should consider the rights, knowledge, innovations and practices of indigenous and local communities; the use of appropriate language and process; the allocation of sufficient time and the provision of accurate, factual and legally correct information. Modifications to the initial development proposal will require the additional prior informed consent of the affected

[1300] Akwé: Kon Guidelines, p. 18.
[1301] Akwé: Kon Guidelines, p. 20.

indigenous and local communities.[1302]

Several points in the above statement require some further attention. First of all, the first sentence is striking, since it requires FPIC only when the national legal regime calls for this. As will be discussed in the following paragraphs, there are also situations in which voluntary schemes may demand FPIC irrespective of whether this is a national legal demand. It will be shown that for instance the Forest Stewardship Council requires FPIC, even when this is not a national legal requirement.[1303] Important to bear in mind, is that the Akwé Kon Guidelines were developed in 2004, so before the adoption of UNDRIP and before the important decisions of the Inter-American Court, primarily the 2007 Saramaka decision. In the meantime, FPIC processes have become more firmly embedded in international law and it is only in and after Saramaka that the integration of FPIC processes with environmental and social impact assessments has gained a stronger legal status.

Nevertheless, the explanation given in the Guidelines does entails the importance of the different elements of FPIC. It is emphasized that sufficient time should be allocated, that sufficient information is to be provided, and that the practices and customs of the indigenous communities involved should be taken into account. Furthermore, in the Guidelines it is correctly stated that FPIC should be obtained in different phases in the process - not as a "single moment" and that alterations in the project should also allow for revision on the basis of prior informed consent.

Informed consent requirements are a general consideration when implementing the Guidelines. However, there are a number of other principles that should be taken into account. Most importantly, in the Guideline a form of self-determined development is advocated. Communities should be encouraged to formulate their own development plans which include mechanisms for impact assessments defined by the communities concerned.[1304]

Other important principles contained in the Guidelines concern the position of elderly, women and youths, the rights of indigenous peoples consistent with international law, the need for transparency, and the creation of review and dispute settlement mechanisms.[1305]

Conclusions

The Akwé Kon Guidelines offer a detailed but flexible plan for the implementation of FPIC processes from the perspective of environmental,

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1302 Akwé: Kon Guidelines, p. 21.

1303 See especially the case study on the Orang Asli of the Malaysian Peninsula, at the end of this paragraph, in which this was a particular important issue. New guidelines acknowledge that FPIC may have force of (international) law, thereby creating norms that may trump national legislation.

1304 Akwé: Kon Guidelines, p. 22.

1305 Akwé: Kon Guidelines, pp. 22-23.

cultural, and social impact assessments (ECSIAs). In this way they offer good guidance on how to implement an important part of the "Saramaka model" on land and participation rights when development projects affect indigenous lands and resources.

One of the most important lessons from the Guidelines is that without proper ECSIAs, conducted in an integrated and holistic manner, it is unlikely that the impact of projects on indigenous lands and their environment is properly assessed. Such assessments are vital for allowing indigenous peoples to make a genuinely *informed* decision. Moreover, indigenous peoples' knowledge may avail other parties in the process to detect unforeseen effects and impact. The Guidelines provide an alert and balanced program which is in line with international law, particularly with the model developed in the context of the OAS.

The Akwé Kon Guidelines in the framework of Article 8(j) CBD have impact assessments as their central theme, and integrate indigenous participation rights. The following system that will be discussed (REDD+) takes FPIC as the key concept for stakeholder engagement. One of the most advanced and recent models for implementation of FPIC can be found within this framework.

V.2.2 FPIC in the UN-REDD Programme

Introduction: Reducing Emissions

Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD) is a model that uses market and financial incentives to reduce greenhouse gasses. It was developed in 2008 in collaboration with the United Nations Development Programme (UNDP), the Food and Agriculture Organization (FAO), and the United Nations Environment Programme (UNEP).[1306] REDD aims to ensure that deforestation and forest degradation can be reduced to a minimum. Deforestation and forest degradation as a result of – for instance – agricultural expansion, infrastructural development projects, timber harvesting, and fires for land clearing account for nearly 20% of global greenhouse gas emissions.[1307]

REDD strategies therefore have the purpose of making the forests more valuable standing up than they would be cut down, and in their final phases, the projects involve developed countries paying developing countries carbon offsets for their standing forests.[1308] They aim to tip the balance in favor of sustainable

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[1306] UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) FAO, UNDP, UNEP, Framework Document, 20 June 2008.
[1307] UN-REDD programme website, http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx, consulted November 2012.
[1308] UN-REDD programme website, http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx, consulted November 2012.

forest management to realize that: "their formidable economic, environmental and social goods and services benefit countries, communities, biodiversity and forest users while also contributing to important reductions in greenhouse gas emissions."[1309]

"REDD+" is the broader framework programme or initiative, and covers – besides degradation and deforestation – the role of conservation, sustainable forest management, and the enhancement of carbon stock.[1310] REDD+ activities can be conducted by local or national governments, NGOs or the private sector. It is a vast programme that aims to do far more than just avoiding deforestation and includes a number of initiatives like the UN-REDD programme and The World Bank's Forest Carbon Partnership Facility (FCPF).[1311] REDD+ is a complex programme with a large number of different approaches to the problems at hand. The 2008 Framework document explains this complexity:

> While the primary cause of deforestation in Latin America was a conversion of forests to large scale permanent agriculture, in Africa deforestation was mainly caused by conversion of forests to small scale permanent agriculture and in Asia there was a mix of direct causes. The underlying causes are often even more intractable, ranging from governance structures, land tenure systems and law enforcement, to market and cultural values of forests, to the rights of indigenous and local communities and benefit sharing mechanisms, to poverty and food production policies. As a result, solutions need to be tailor-made to the environmental and socio-economic conditions of each country and their institutional capacity.[1312]

It would be beyond the scope of this study to go into all the different possible initiatives and actions that can be undertaken in the framework of REDD+. The

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[1309] UN-REDD programme website, http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx, consulted November 2012.

[1310] UN-REDD programme website, http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx, consulted November 2012, On the website it is explained that: In order to constrain the impacts of climate change within limits that society will reasonable be able to tolerate, the global average temperatures must be stabilized within two degrees Celsius. This will be practically impossible to achieve without reducing emissions from the forest sector." REDD+ is thus a climate change mitigation solution (or strategy/mechanism) that a number of initiatives, including the UN-REDD Programme, are supporting and developing. Other multilateral REDD+ initiatives include the Forest Carbon Partnership Facility (FCPF) and the Forest Investment Programme (FIP), in the framework of the World Bank Group.

[1311] World Bank's Forest Carbon Partnership Facility, http://www.forestcarbonpartnership.org/fcp/node/12, consulted November 2012.

[1312] UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) FAO, UNDP, UNEP, Framework Document, 20 June 2008, p. 2. This paragraph will refer to REDD+ and REDD interchangeably, but the broader REDD+ framework is meant.

focus in the following paragraphs will be on the role of indigenous peoples and FPIC within REDD+ mechanisms and strategies.[1313]

Indigenous Peoples and FPIC in REDD+

Since the majority of the world's forests in developing countries are located in places where indigenous peoples live, participation of these communities is seen as essential for successful REDD+ strategies.[1314] Given that inadequate mechanisms of effective participation of indigenous peoples in REDD+ could seriously jeopardize the benefits of the system, FPIC is embraced as the means to guarantee adequate involvement. A number of different reports and documents on FPIC implementation in REDD+ strategies have been produced, of which two of the most recent and important ones will be discussed in this paragraph: firstly, the "Guidelines on Stakeholder Engagement in REDD+" and secondly, the "UN-REDD Programme Guidelines on Free, Prior and Informed Consent," which are in their final drafting phases.[1315] The emphasis will be on the *Joint* and *Draft* Guidelines, since they entail the most recent and most comprehensive treatment of FPIC.[1316]

Joint Guidelines on Stakeholder Consultation

Within the framework of REDD+ the critical role that indigenous peoples (and forest dependent communities) have with respect to the long term sustainability and effectiveness of the strategies is stressed.[1317] Following a series of consultation rounds with indigenous groups, the UN-REDD developed the Joint Guidelines in close cooperation with the FCPF.[1318]

[1313] Importantly, REDD+ recognizes the importance of (strategic) environmental and social impact assessments who have to result in Environmental and Social Management Frameworks (ESMFs). See Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities April 20, 2012 (revision of March 25th version) (Joint Guidelines), p. 19.

[1314] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012.

[1315] Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities April 20, 2012 (revision of March 25th version) (*Joint Guidelines*). UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012 (*Draft Guidelines*).

[1316] Other, older documents will also be referred to, since they are also referred to in the mentioned guidelines. An important document in this respect is: Free, Prior, and Informed Consent in REDD+, Principles and Approaches for Policy and Project Development, RECOFTC/GIZ, Bankok, February 2011. (*Principles and Approaches*).

[1317] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 4.

[1318] Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities April 20, 2012 (revision of March 25th version), see: UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 4.

These *Joint Guidelines* broadly present the framework for engagement and participation of stakeholders in REDD+ strategies. They develop a number of principles for effective stakeholder engagement that include: recognition of the diversity of stakeholders, the need to hear voices of vulnerable groups, transparent and timely information, facilitation of dialogue and consensus building, special attention for indigenous decision making structures, land tenure and resource use, and fair grievance mechanisms.[1319]

Furthermore, the Joint Guidelines propose an eight step plan for carrying out effective consultations:

1. Define the desired outcomes of consultations
2. Identify stakeholders
3. Define the issues to consult on
4. Define the terms of the consultation
5. Select the consultation and outreach methods
6. Ensure that stakeholders have sufficient capacity to engage fully and effectively in consultations
7. Conduct the consultations
8. Analyse and disseminate results[1320]

These steps are useful for an initial mapping of the interests of stakeholders but are evidently not enough to secure FPIC for indigenous communities. Therefore, the *Draft Guidelines* go further than the Joint Guidelines a step further and include a normative policy and operational framework for UN-REDD countries to seek FPIC.[1321] The UN-REDD Programme is held to promote respect for, and to seek the full application of, UNDRIP. For that reason, FPIC is a mandatory requirement in the Programme regarding activities that affect indigenous peoples lands, territories, and resources.[1322]

Draft UN-REDD Programme Guidelines on Free, Prior and Informed Consent

The *Draft Guidelines* are the most important documents related to FPIC in the context of REDD+ because they incorporate the most recent FPIC standards and lessons from so-called "FPIC pilots," mainly in Vietnam and Indonesia.

[1319] Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities April 20, 2012 (revision of March 25th version), p. 5.

[1320] Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities April 20, 2012 (revision of March 25th version), pp. 6-11. These eight steps were also followed in the FPIC Pilot in Vietnam, to be discussed below.

[1321] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 4.

[1322] See: UN-REDD Programme website: http://www.unredd.org/Stakeholder_Engagement/Guidelines_on_FPIC/tabid/55718/Default.aspx. Consulted February 2013.

They should be applied in conjunction with the *Joint Guidelines* discussed above. The Draft Guidelines are directed at partner States and contain an important affirmation that international law recognizes the right to FPIC for indigenous communities.[1323] Furthermore, the Draft Guidelines recognize that other forest dependent communities may be similarly affected by REDD+ strategies, so that FPIC may also become a requirement in respect of these groups.[1324] This pragmatic approach is not unique: FPIC is about giving vulnerable groups a say in decisions that affect them and especially in forest areas chances are that other non-indigenous communities may have quite similar interests.

In the Draft Guidelines the legal framework of FPIC is well described. In the Guidelines it is acknowledged that FPIC is a corollary of a myriad of universally accepted human rights, including the right to self-determination, and rights to participation, property, cultural integrity, and equality.[1325] The Guidelines also contain a "Legal Companion," in which the most relevant provisions and statements concerning FPIC in international law have been included. The firm basis for FPIC that is sought in international law increases the legitimacy of the REDD+ Draft Guidelines and REDD+ strategies can only be effectively implemented when a human rights based approach is followed.

A consequence of the detailed alignment between FPIC in the context of REDD+ and international law is that FPIC is described as a process instead of as a single moment of decision-making and one that acknowledges that the goal of such processes is to protect indigenous peoples' lands and resources and thereby their cultural and physical survival. The reasoning from Saramaka People v. Suriname and the spirit of the UNDRIP therefore make up the foundation of FPIC requirements in REDD+ as well.[1326]

In defining FPIC, the Draft Guidelines also follow the Elements of a Common Understanding from the 2005 UNPFII workshop.[1327] Importantly, the Draft Guidelines also state that:

> While the objective of consultation processes shall be to reach agreement (consent) between the relevant parties, this does not mean that all FPIC processes will lead to the consent and approval by the rights-holders in question. At the core of the right to choose to engage, negotiate and decide to grant or withhold consent, is the

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1323 UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 6. The Draft Guidelines build on and expand the 2011 report: Free, Prior, and Informed Consent in REDD+, Principles and Approaches for Policy and Project Development, RECOFTC/GIZ, Bankok, February 2011.

1324 UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, pp. 6-7.

1325 UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 7.

1326 UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 11.

1327 UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, pp. 12-13. See: E/C.19/2005/3, paragraph 46.

> acknowledgment that under certain circumstances, it must be accepted that the project will not proceed and/or that engagement must be ceased if the affected peoples decide that they do not want to commence or continue with negotiations or if they decide to withhold their consent to the project.[1328]

In this passage "under certain circumstances" is of course the key phrase. It will depend on the impact and nature of the violated rights whether FPIC processes will gain a more mandatory character. It remains important to judge on a case-by-case basis, what impact the proposed project will have. Moreover, it is vital to determine which rights may be violated, be they national, international, or customary. The Draft Guidelines do – in line with what is argued in this study – acknowledge that it is not possible to see consultation processes detached from "consent," which always should be the goal of such processes.

In conclusion, in the Draft Guidelines the most recent developments with respect to FPIC in international law are enshrined these are integrated in its procedure. This is quite important because it is reflected in the offered implementation model, which increases the value of the document as a more general implementation guide to FPIC.

The Implementation Model of the Draft Guidelines

The Draft Guidelines clearly mention that it is up to the State (a Partner Country) to develop consultation and participation plans for engagement with indigenous peoples.[1329] They provide a practical step-by-step implementation model for the development of community FPIC protocols. Initially, the State should develop a national FPIC guideline:

[1328] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p 14.

[1329] This is clearly in line with the IACtHR interpretation and UNDRIP, discussed in previous paragraphs. What is also mentioned, is that peoples living in voluntary isolation should not be contacted. Their decision to remain isolated should be respected at all times. UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p 14, 15. Also see p. 21: "The duty and responsibility to secure FPIC ultimately belongs to the State. This obligation cannot be delegated to a third party/private party." Furthermore, it is stated that: "[T]he Partner Country's own recognition or identification of the community as 'Indigenous Peoples' shall not be the dispositive factor." Important to note here is that although obtaining consent is a duty for the State, this does not imply that indigenous peoples have a duty to negotiate FPIC agreements at all costs. They cannot be forced to participate; compare e.g. the situation of peoples living in voluntary isolation.

Indicative Steps for Developing National FPIC Guideline

1. *Identify the relevant principles for the guidelines*
   - The country's obligations under national and international law
   - UN-REDD Programme FPIC Guidelines
2. *Identify any existing processes for consultation and consent concerning relevant stakeholders' land and land use planning or natural resource development, and analyze the strengths and weaknesses of these processes*
   - For example, are they being properly followed? Where is the existing system breaking down?
   - Are these systems effective in protecting the rights of Indigenous Peoples and other Forest Dependent Communities?
3. *Develop first draft of FPIC guidelines*
   - Ensure that there is a process of public consultation and validation by stakeholders on the guidelines.
   - Include any actors which are likely to be involved in implementing the guidelines, such as local or national forestry authorities.
4. *Field test draft FPIC guidelines at a pilot site*
   - This should preferably be done where there is a concrete proposal which requires consent from the local rights-holders
5. *Independently evaluate the field test*
6. *Amend the draft FPIC guidelines, as necessary*
   - Undertake a validation process with all stakeholders
7. *Consider how the FPIC guidelines could be formalized*
   - For example, by adopting the right to FPIC in legislation, and consider how the guidelines could be integrated into a broader regulatory scheme for REDD+.[1330]

These basic, preliminary guidelines may help countries that do not have adequate consultation or consent processes available, although they are still quite general. In point 4 it is indicated that it is desirable to conduct a field test or "pilot" process. Later in this paragraph two of these pilots will be briefly examined, since these are some of the first real "FPIC in practice" studies available.

In the document it is furthermore explained when FPIC is required, according to international law, and a more practical checklist for when FPIC is required is given. In the guidelines it is affirmed that the specifics of the consultation process will vary depending on the nature of the proposed activity and on the impact it may

[1330] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 16.

have.[1331] In the Draft Guidelines the different articles in UNDRIP with regard to FPIC are mentioned and an account of the jurisprudence of the Inter-American Court and the African Commission is provided. Furthermore, the new IFC Performance Standard 7 is examined in order to explain when FPIC is required. It is also mentioned that communal property rights or customary rights must be respected regardless of the national government's recognition of those.[1332] All this leads to the following ten-step model:

CHECKLIST FOR APPRAISING WHETHER AN ACTIVITY WILL REQUIRE FPIC	Yes/No
1. Will the activity involve the relocation/resettlement/removal of an indigenous population from their lands?	
2. Will the activity involve the taking, confiscation, removal or damage of cultural, intellectual, religious and/or spiritual property from Indigenous Peoples / Forest Dependent Community?	
3. Will the activity adopt or implement any legislative or administrative measures that will affect the rights, lands, territories and/or resources of Indigenous Peoples / Forest Dependent Community (e.g. in connection with the development, utilization or exploitation of mineral, water or other resources)?	
4. Will the activity involve mining and oil and/or gas operations (extraction of subsurface resources) on the lands/territories of Indigenous Peoples / Forest Dependent Community?	
5. Will the activity involve logging on the lands/territories of Indigenous Peoples / Forest Dependent Community?	
6. Will the activity involve the development of agro-industrial plantations on the lands/territories of Indigenous Peoples / Forest Dependent Community?	
7. Will the activity involve any decisions that will affect the status of Indigenous Peoples' / Forest Dependent Community's rights to their lands/territories or resources?	
8. Will the activity involve the accessing of traditional knowledge, innovations and practices of indigenous and local communities?	

[1331] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 17.

[1332] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 19. This goes a step further than the joint guidelines. Later in this paragraph, when examining the 'Orang Asli' case in Malaysia, it will be illustrated that this is a vital point for effectively protecting indigenous communities, even where sustainability initiatives are implemented.

9. Will the activity involve making commercial use of natural and/or cultural resources on lands subject to traditional ownership and/or under customary use by Indigenous Peoples / Forest Dependent Community?	
10. Will the activity involve decisions regarding benefit-sharing arrangements, when benefits are derived from the lands/ territories/resources of Indigenous Peoples/Forest Dependent Community?[1333]	

Although they are very concise, it is possible to discern most of the situations and legal requirements that were examined in the previous paragraphs in these ten questions. Therefore they provide a good practical starting point for deciding whether FPIC is relevant. So when the answer to any of these questions is "yes" it is quite likely that FPIC is required for the proposed activity or decision.[1334]

The following step is to pave the way for the development of a more specific "community FPIC protocol," designed to obtain FPIC for the proposed activity.[1335] The operational framework for conducting the FPIC process in the UN-REDD Programme is roughly divided in three major steps:

1. Partner Countries, in collaboration with relevant rights-holders, and taking into account the duties and obligations under international law, will undertake an FPIC scoping review.[1336]

This first step will include - amongst others - a description of the proposed activity or policy, a description of the rights holders and their governance structures as well as clear guidelines on how they wish to be engaged in the process. Furthermore, the legal and geographical status of the lands, territories and resources of the involved rights holders will have to be charted. It is also during this first step that the social, environmental, and cultural impact assessments – derived from Saramaka People v. Suriname and the Akwé Kon Guidelines examined above – will have to be conducted. Last but not least, during this phase the resources for the process will have to be allocated.[1337]

Clearly, the first step in the operational framework takes into account the most recent findings and procedures, based on the international legal framework and the case law of the Inter-American Court. After this important first stage –

1333 UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 19-20.
1334 UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 20.
1335 Or, of course, to allow communities not to consent to the proposed project in a free and informed process.
1336 UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 23.
1337 UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 23.

and its outcome's acceptance by all parties – it is time for the development of a proposal:

2. The partner country, in consultation with the rights-holders, should develop an FPIC proposal that outlines the proposed process to seek FPIC.[1338]

During the proposal phase, the information and communication requirements need to be addressed.[1339] As was discussed before, this includes not just the provision of relevant information but also respect for the requirements of effective communication. In this phase it is also vital that the capacity needs of the indigenous communities involved are properly addressed.

Moreover, it is important to develop a timeline for the proposed consultations, as well as an understanding of how the decisions are to be taken, taking into account indigenous traditions and customs, while guaranteeing the participation of women and other vulnerable groups within communities.[1340]

Determining *how* FPIC is given, recognized, and recorded is also essential and the role of other actors in this process (e.g. government officials, donors, UN agencies etc.) has to be determined. Verification methods for the process, like participatory monitoring, are essential to guarantee the transparency of the process. Finally, it is important to develop complaint mechanisms for stakeholders to ensure adequate involvement of all affected stakeholders.[1341]

In this second phase, the drafting of actual FPIC proposal, the emphasis is on creating mechanisms for ongoing dialogue, participation, consultation, and consent. These should be transparent and respectful of the intercultural differences that may occur. It is in this phase that it is most essential to establish an "intercultural dialogue" and to ensure that FPIC processes take place in an atmosphere that can be described as "free." As examined in Part III, this will have to involve a large degree of discursive control on the part of the affected communities. FPIC is a process of co-responsible decision making.

3. Agreement upon the FPIC process and opportunities for evaluation and review.

When these initial steps have been undertaken – that is, when rights holders agree to finalize the negotiations – it is time to combine the scoping review and the proposal into one document which should be agreed upon by all parties.[1342]

[1338] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 24.
[1339] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 24.
[1340] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 24.
[1341] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 24.
[1342] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 25.

This document or procedure then forms the legitimate course to conduct the actual FPIC process. This combines insights explored earlier in this study, namely that FPIC processes should be flexible and tailor-made to suit specific intercultural situations, while they should still adheres to certain principles and norms that have been internationally agreed upon. The UN-REDD model seems to strike a proper balance in this respect, at least in theory.

An important element of FPIC processes – an element that was already elaborated upon when discussing indigenous self-determination and Tully's intercultural dialogue – is that arrangements should be open to review and grievance. Indigenous peoples are in an enduring relationship with the larger States in which they reside, and continuity has been described as one of the pillars of a successful intercultural constitution.[1343] FPIC is not a single moment of decision making, or ends at that point, but has to involve a continuous process of mutual recognition.

In the Draft Guidelines this is acknowledged and it is stressed that there should be independent evaluations and grievance mechanisms. The evaluations should be undertaken by an institution agreed upon by all stakeholders, in order to verify that the process has been in line with the requirements of international law and the Joint Guidelines.[1344]

Moreover, a national grievance mechanism should be developed since the complexity of the issues and the diversity of stakeholders may lead to numerous questions and possible objections.[1345] Such a mechanism is described as a "process for receiving and facilitating resolution of queries and grievances from affected communities or stakeholders related to REDD+ activities, policies or programs at the level of the community or country."[1346] The establishment of such a platform is in line with what the Inter-American Court has stated in Awas Tingni and later cases: that an effective mechanism for dispute resolution has to be created. According to the Draft Guidelines, these grievance mechanisms are to be considered effective when they: "address concerns promptly and fairly, using an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected stakeholders."[1347] It is indicated in the Draft Guidelines that these mechanisms are critical to ensuring that grievances and disputes in FPIC processes are addressed in a proper manner.[1348]

[1343] Where constitution is used in the sense that it was described in the paragraph on James Tully's intercultural dialogue.

[1344] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 25.

[1345] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 26.

[1346] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 26.

[1347] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 26.

[1348] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, p. 26.

The process described above has been broadly summarized in the following model:

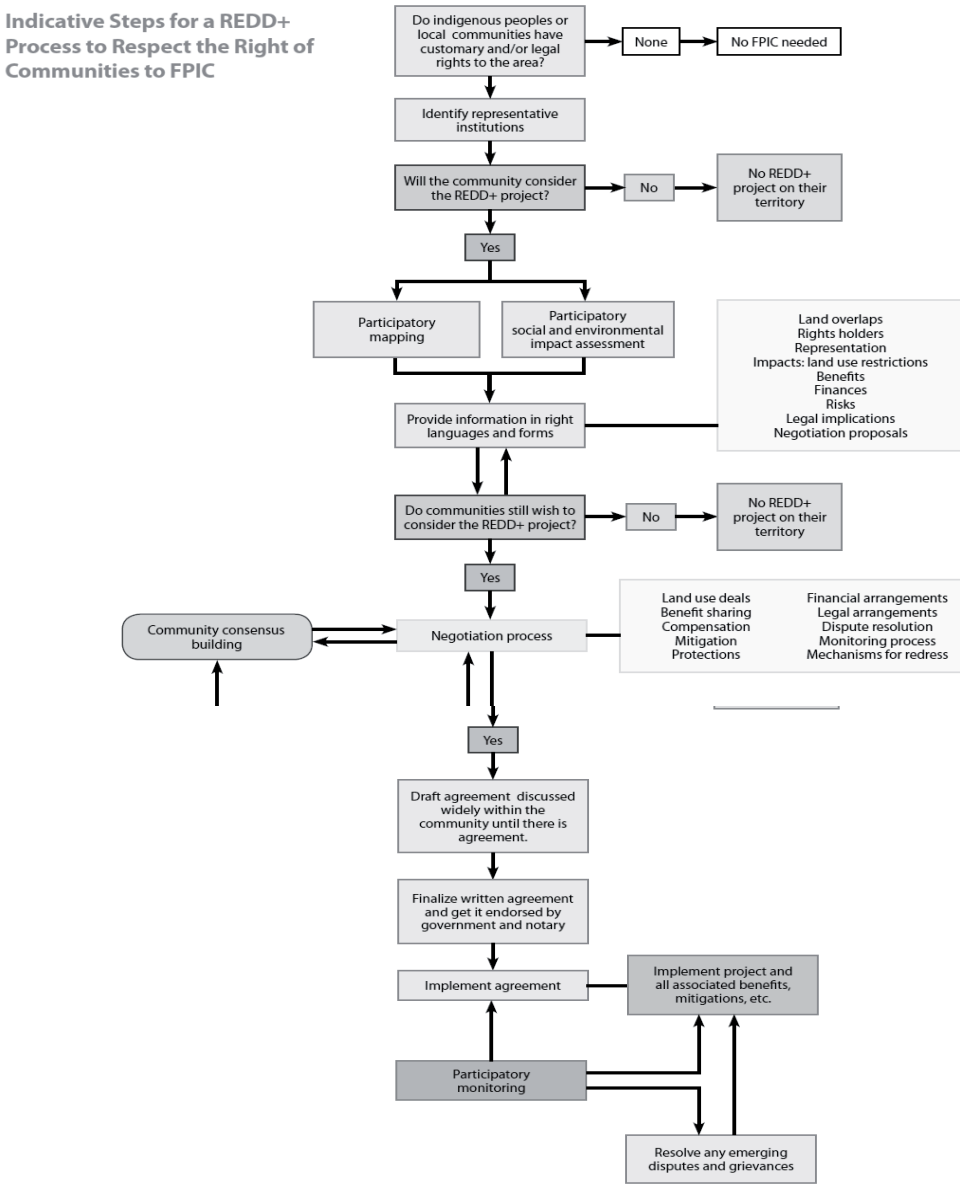

Figure: Indicative Steps for a REDD+ Process to Respect the Right of Communities to FPIC.[1349]

[1349] Anderson P, 'Free, Prior, and Informed Consent: Principles and Approaches for Policy and Project Development', RECOFTC – The Center for People and Forests, Deutsche

FPIC Pilots in Vietnam, Indonesia and elsewhere

The final phase – the development of grievance mechanisms and independent evaluations is not only vital to ensure that the specific FPIC process is successfully implemented, but is also essential in creating a body of practice that is needed in order to effectively implement FPIC processes in other settings.[1350] In this respect, the UN-REDD Programme has a pioneer role in providing best practice documentation. Nevertheless, there are only a few of these pilot-studies underway, and more are needed to effectively assess the chances and problems of FPIC processes.

The UN REDD Programme has summarized the lessons learned from two pilot projects, one in Central Sulawesi, Indonesia and a second in Lam Dong Province, Vietnam. Since the most detailed assessment was conducted with regard to the Vietnam pilot, that case will be subject to a more in-depth examination.[1351]

The FPIC trial in Indonesia revealed that it is important to segment the audiences to divide the ways and means in which people are informed according to their needs and capacity.[1352] Furthermore, it was found that the more concrete a proposal is, the easier it was for communities to understand the nature and impact of a certain activity. In the Vietnam pilot, the question was if the people would agree to REDD+ activities, while in Indonesia, they were asked about specific replanting initiatives.[1353]

Using trained facilitators from the community itself greatly improved the understanding of the project since building trust between the facilitator and community is far easier this way.

FPIC in Lam Dong Province Vietnam

The FPIC process in Vietnam is the first and most successful example in the framework of REDD+.[1354] The process started in early 2010 when the need to

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Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Sector Network Natural Resources and Rural Development – Asia, Bangkok, February 2011, p. 24-25.

[1350] This is the main future challenge, comparative studies into different 'best and worst' practices of FPIC processes should lead to a better understanding on how to proceed with implementation.

[1351] Nevertheless, it is not the purpose of this work to develop a comparative best-practice study on the application of FPIC. One of the main recommendations however, is that such studies should be undertaken, since they offer one of the best ways to advance understanding of a proper and practical implementation of FPIC requirements.

[1352] For instance the use of visual information for illiterate people and written documents for others.

[1353] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, Annex VI, lessons learned from FPIC pilot experiences, UN-REDD Programme Vietnam and UN-REDD Programme Indonesia, p. 37.

[1354] For the full report see the country website: http://vietnam-redd.org/: Applying the Principle of Free, Prior and Informed Consent in the UN-REDD Programme in Vietnam, August 2010.

obtain FPIC was identified on the designated pilot sites. The Programme staff and consultants designed the process and developed the necessary awareness raising materials, which included consultations with the different communities. Some documents were also published in the local K'Ho language.[1355]

An FPIC team of facilitators or interlocutors was recruited to implement the process. This included training on climate change, the UN-REDD Programme, communication skills, and field practice.[1356] The actual FPIC process, conducted between April and June 2010, concerned 78 villages in 12 communes in Lam Dong Province. Various awareness raising activities, workshops, and consultations were held and both the Vietnamese and K'Ho language were used to ensure that the people understood the contents of the discussions.[1357]

At different moments in the process, facilitators had to reflect, adjust, and improve their methods of organizing the village-level process and the ways in which awareness raising took place.[1358] Eventually the FPIC decision had to be recorded, which itself included a number of difficulties. The signing of a consent sheet was replaced by a show-of-hands voting, due to the fear of some local people that signing their names might make them vulnerable to criticism in the future. However, a show of hands is difficult to record and does not avoid the effect of majority pressure for a certain decision. Eventually, anonymous ballot papers were chosen to allow the villagers to express their opinion freely and in secret.[1359]

The evaluation of the FPIC trial in Vietnam broadly led to the following eight lessons:

- Adequate time needs to be allowed for awareness raising.
- Adequate time must be given to absorb information and for internal discussion.
- Local PFIC events can be very time-consuming and complex.
- Engagement with local authorities needs to be managed carefully and flexibly.
- Local facilitators are essential for effective awareness-raising and discussion.

[1355] Assessing the Effectiveness of Training and Awareness Raising Activities of the UNREDD Programme in Viet Nam (2009-2011) UN-REDD PROGRAMME, June 2012, p. 27.

[1356] Assessing the Effectiveness of Training and Awareness Raising Activities of the UNREDD Programme in Viet Nam (2009-2011) UN-REDD PROGRAMME, June 2012, p. 27.

[1357] Assessing the Effectiveness of Training and Awareness Raising Activities of the UNREDD Programme in Viet Nam (2009-2011) UN-REDD PROGRAMME, June 2012, p. 27.

[1358] Assessing the Effectiveness of Training and Awareness Raising Activities of the UNREDD Programme in Viet Nam (2009-2011) UN-REDD PROGRAMME, June 2012, p. 27.

[1359] Applying the Principle of Free, Prior and Informed Consent in the UN-REDD Programme in Vietnam, August 2010, p. 35. See this report for a complete overview of the process.

- Documenting FPIC decisions can be challenging.
- Managing expectations of villagers is important.
- A mechanism for addressing grievances and disputes should be identified and established at the outset.[1360]

While these lessons do not by themselves lead to very new insights – most of them were already addressed earlier on in this study – it is of vital importance to document and compare the different practices on FPIC.

When a larger number of these studies is available, it is to be hoped that comparative research is developed. This will undoubtedly reveal a number of important perspectives relevant for successful FPIC processes. While the Indonesian and Vietnamese FPIC pilots are still the only ones within the framework of UN-REDD that are "finalized," a detailed study of these and other FPIC pilots in the Asian region was published in November 2012.[1361]

The Vietnam pilot has been the most elaborate study of FPIC in practice and involved the organization of about 12 technical trainings with 400 participants for FPIC facilitators, about 90 village level workshops, the development of posters, television and radio broadcasts, and a programme website.[1362] A thorough assessment of the different training and awareness raising activities led to a detailed report on the effectiveness of the FPIC process.[1363] Such effectiveness assessments will undoubtedly be of great value to the successful implementation of FPIC processes, within and outside of the REDD framework.

Conclusions: FPIC Implementation Models and Best Practice Studies in UN-REDD

The UN-REDD Programme and the Draft Guidelines in particular provide one of the most recent and complete models for implementing FPIC processes. They incorporate state of the art international legal developments concerning FPIC and indigenous rights and acknowledge that although some guidance is evidently necessary, it is also important not to lose sight of the myriad of different intercultural situations in which FPIC is relevant.

[1360] UN-REDD Programme Guidelines on Free, Prior and Informed Consent, Final Working Draft, October 2012, Annex VI, lessons learned from FPIC pilot experiences, UN-REDD Programme Vietnam and UN-REDD Programme Indonesia, p. 38. For a detailed overview of these lessons, see: Applying Free, Prior and Informed Consent in Viet Nam, UN-REDD Programme, April 2010. And: UN-REDD Programme, Fact Sheet on Work on Free, Prior Informed Consent in Vietnam.

[1361] UN-REDD Programme, Free, Prior and Informed Consent for REDD+ in the Asia-Pacific Region: Lessons Learned, November 2012.

[1362] Assessing the Effectiveness of Training and Awareness Raising Activities of the UNREDD Programme in Viet Nam (2009-2011) UN-REDD PROGRAMME, June 2012, pp. 15-27.

[1363] Assessing the Effectiveness of Training and Awareness Raising Activities of the UNREDD Programme in Viet Nam (2009-2011) UN-REDD PROGRAMME, June 2012. See pp. 29-34 for the main findings, lessons and recommendations.

The step by step approach offers a systematic plan for States who are struggling with implementing FPIC requirements. Due to its basis in international law and the large diversity of possible REDD+ related activities, the UN-REDD system may have application outside the scope of reducing emissions. Furthermore, comparative practice studies on FPIC pilots are being developed in the framework of UN-REDD. Although these are still in an early phase, a lot of practical knowledge will be revealed when these studies are conducted and structured in a more expanded manner in the future. All in all, the work of the UN-REDD Programme on FPIC is one of the most promising developments related to implementation of FPIC processes.

V.2.3 The Forest Stewardship Council Guidelines on FPIC

Introduction

The next implementation system that will be explored is to be found in the FSC Guidelines on FPIC.[1364] Although "free and informed consent" has been a requirement in the Forest Stewardship Council's principles and criteria since 1994, the first official version of the guidelines was adopted very recently, in October 2012. It is remarkable that virtually no detailed and documented best practices on the implementation of this requirement have been available.[1365]

In the following paragraphs some key characteristics of sustainable forest management will be briefly discussed before a more in-depth examination of the FSC's system and recent implementation model will be provided for.

Sustainable Forest Management

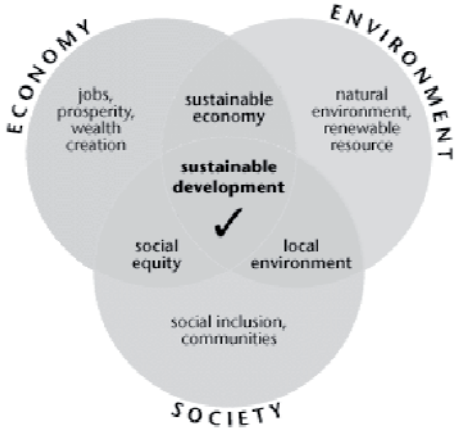
Over the past decade large changes occurred in the timber sector. No real requirements on *legality* and *sustainability* existed previously but now, with the general recognition that the world's forests are diminishing rapidly, criteria and certification schemes are developed that have the aim of securing that timber logging is conducted in a legal and sustainable manner. These are becoming an important tool for combating deforestation. Especially in the equatorial region, where a large part of the tropical rainforest has already disappeared, these measures

[1364] FSC Guidelines for the implementation of the right to free, prior and informed consent (FPIC), Forest Stewardship Council Technical Series No. 2012-2, Version 1, 30 October 2012 (Henceforth: FSC Guidelines 2012).

[1365] FSC Guidelines 2012, p. 6. It is also noted that: "several conflicts arising from disregarding this right have been reported." One exception is a 2008 study of FPIC and SFM in the Congo Basin: Lewis J, Freeman L and Borreill S, 'Free, Prior and Informed Consent and Sustainable Forest Management in the Congo Basin, A Feasibility Study conducted in the Democratic Republic of Congo, Republic of Congo and Gabon regarding the operationalisation of FSC Principles 2 and 3 in the Congo Basin', July 2008.

are vital.[1366] The Amazon region, the Congo Basin, and South-East Asia are the core suppliers of tropical wood, and it is in these parts that large areas of tropical rainforest have visibly disappeared. Some tree species have become extremely rare, due to forms of "cherry-picking" logging in these most diverse forests. The timber industry is forced to innovate and to practice more sustainable methods of forest management.[1367]

The basic idea behind sustainable development is that it meets the needs of the present without compromising the ability of future generations to meet their own needs. In sustainable forest management the importance of linking the economic, environmental, and social value of forests in a single scheme is recognized.[1368] The Great-Britain forestry commission illustrates these broad objectives of sustainability in the following model: [1369]



The principles underlying forestry management have shifted over time and the initial focus on achieving sustained production of a single commodity has been abandoned for a more realistic and holistic approach called Sustainable Forest Management (SFM).[1370] Part of this approach is introducing certification schemes,

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[1366] The situation in the Arctic and other 'pine-tree regions' seems to be less desperate, the 'softer' type of wood that come from these areas is easier to manage in a sustainable manner, since there is not so much diversity as in the tropical 'hard wood' areas.

[1367] An example of this is that the industry is experimenting with injecting glue like substances in 'softer' types of wood to give them the characteristics of tropical wood. The timber sector is anticipating the disappearance of tropical 'hard' wood for the market in the near future.

[1368] These criteria are often referred to as the three 'P's': People, Planet and Profit.

[1369] Diagram taken from the Great Britain Forestry Commission website:
http://www.forestry.gov.uk/website/forestry.nsf/byunique/edik-59fmzf.
Consulted December 2011.

[1370] Nasi R and Frost P G H, 'Sustainable forest management in the tropics: Is everything in order but the patient still dying', 14 Ecology and Society 40, 2009. The PEFC international standard defines SFM as: A holistic approach defined as the stewardship and use of forests and forest land in a way and at a rate that maintains their biodiversity, productivity, regeneration capacity, vitality and potential to fulfill, now and in the future, relevant ecological, economic and social functions, at local, national and global levels and does not cause damage to other

devised to assure consumers that the products they purchase are produced in a sustainable manner, equitably and with adequate management.[1371]

The debate surrounding sustainability and forest management is vast and complex. The basic premises are contested and fundamental questions remain unanswered. Even the very aim and achievability of the available solutions is questioned: Is sustainable forest management – as the key standard – really achievable at all? Is it possible to define sustainability? Can the triple bottom line of "people, planet and profit" be upheld or should trade-offs be made in order to make real progress?[1372] Going into these highly intricate questions is far beyond the scope of this paragraph, but awareness of their existence is important for a better understanding of the issues in this and the following paragraphs, especially when we discuss the mixed experiences the Orang Asli People of Peninsular Malaysia have with SFM. An important part of the regulatory framework devised to structure the requirements of sustainable forest management, are the certification schemes devised to control forestry along the entire "chain of custody" by upholding a principled approach and tracking the forest produce from source to user.

Two main certification organizations exist, The Forest Stewardship Council (FSC) and the Programme for the Endorsement of Forest Certification (PEFC). FSC is a single certificate to which accession is possible, while PEFC is structured more like an umbrella organization that allows other certificates to use the certificate when they adhere to certain standards.[1373]

The social criteria are an important element of these schemes, and they incorporate international standards related to indigenous peoples, like ILO Convention No. 169, UNDRIP, and the CBD.[1374] They furthermore include procedures for stakeholder engagement and participation of local and indigenous communities in SFM. Protection and participation of indigenous peoples has a central role in SFM and, according to the website of PEFC, 60 million indigenous people are fully dependent upon the forests and an additional 350 million depend on them primarily for income and subsistence.[1375] The loss of forests threatens the

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ecosystems. See: PEFC International Standard, PEFC ST 1003: 2010, requirements for sustainable forest management.

[1371] Nasi R and Frost P G H, 'Sustainable forest management in the tropics: Is everything in order but the patient still dying', 14 Ecology and Society 40, 2009.

[1372] Nasi R and Frost P G H, 'Sustainable forest management in the tropics: Is everything in order but the patient still dying', 14 Ecology and Society 40, 2009.

[1373] Noteworthy, FSC was set up by societal and environmental organizations (NGOs), while PEFC was created by the timber industry as its counterpart. Rivalry and competition between the two is not uncommon.

[1374] See *e.g.* http://www.pefc.org/forest-issues/sustainability/indigenous-people: "We also require that forest management activities shall be conducted in recognition of the established framework of legal, customary and traditional rights, which shall not be infringed upon without the free and informed consent of the holders of the rights." FSC International Standard, Fsc Principles And Criteria For Forest, Stewardship, Fsc-Std-01-001 (Version 4-0) En.

[1375] It is unclear to what extent these statistics are reliable.

way of life and the very livelihoods of many of the indigenous peoples that live and work directly in forests and forest landscapes.[1376]

Different types of standards aim to secure the protection of indigenous peoples within certification schemes. Within the framework of FSC, these standards are most developed.

Comparing The FSC Principles and Criteria

FSC operates along a list of ten key principles and corollary criteria (P&C) that guide the forest management operations. They were first published in 1994 and amended in 1996, 1999, and 2001.[1377] The forest management unit – the organization that seeks FSC certification – must prove that it respects all ten principles before certification is awarded.[1378]

In 2009, FSC initiated a comprehensive review of its P&C, which resulted in a new version in January 2012. The new P&C (which are not yet in use for the auditing process, but which will gradually be implemented over the coming period) contain some important changes with regard to FPIC and therefore will be compared with the older version here.[1379]

Principle 3, of the 1996 P&C clearly reflects the key role of indigenous peoples in SFM:

> Principle #3: Indigenous peoples' rights (1996)
>
> The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.
>
> 3.1 Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.
> 3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.
> 3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.

1376 http://www.pefc.org/forest-issues/sustainability/indigenous-people. Consulted 11 December 2012.
1377 FSC international standard, FSC Principles and Criteria for Forest Stewardship, Fsc-Std-01-001 (version 4-0) En, 1996.
1378 FSC Website: https://ic.fsc.org/principles-and-criteria.34.htm. Consulted April 2013.
1379 FSC international standard, FSC Principles and Criteria for Forest Stewardship, Fsc-Std-01-001 (version 5-0) En, 2012.

> 3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.[1380]

In the 1996 P&C it is stated that indigenous peoples control their lands and resources, unless they delegate control by a process of free and informed consent. Furthermore, In Principle 3 it is indicated that indigenous peoples are entitled to compensation and that sacred sites and resource tenure are to be respected by external forest managers.

In the new Principle 3 the requirements for dealing with indigenous peoples are expanded and a more detailed explanation of FSC's policy on the matter is provided:

> Principle #3: Indigenous Peoples' Rights (2012)
>
> The Organization shall identify and uphold indigenous peoples' legal and customary rights of ownership, use and management of land, territories and resources affected by management activities.
>
> 3.1 The Organization shall identify the indigenous peoples that exist within the Management Unit or are affected by management activities. The Organization shall then, through engagement with these indigenous peoples, identify their rights of tenure, their rights of access to and use of forest resources and ecosystem services, their customary rights and legal rights and obligations, that apply within the Management Unit. The Organization shall also identify areas where these rights are contested.
> 3.2 The Organization shall recognize and uphold the legal and customary rights of indigenous peoples to maintain control over management activities within or related to the Management Unit to the extent necessary to protect their rights, resources and lands and territories. Delegation by indigenous peoples of control over management activities to third parties requires Free, Prior and Informed Consent.
> 3.3 In the event of delegation of control over management activities, a binding agreement between The Organization and the indigenous peoples shall be concluded through Free, Prior and Informed Consent. The agreement shall define its duration, provisions for renegotiation, renewal, termination, economic conditions and other terms and conditions. The agreement shall

[1380] FSC International Standard, FSC Principles And Criteria For Forest, Stewardship, Fsc-Std-01-001 (Version 4-0) En. Emphasis added.

> make provision for monitoring by indigenous peoples of The Organization's compliance with its terms and conditions.
> 3.4 The Organization shall recognize and uphold the rights, customs and culture of indigenous peoples as defined in the United Nations Declaration on the Rights of Indigenous Peoples (2007) and ILO Convention 169 (1989).
> 3.5 The Organization, through engagement with indigenous peoples, shall identify sites which are of special cultural, ecological, economic, religious or spiritual significance and for which these indigenous peoples hold legal or customary rights. These sites shall be recognized by The Organization and their management, and/or protection shall be agreed through engagement with these indigenous peoples.
> 3.6 The Organization shall uphold the right of indigenous peoples to protect and utilize their traditional knowledge and shall compensate indigenous peoples for the utilization of such knowledge and their intellectual property. A binding agreement as per Criterion 3.3 shall be concluded between The Organization and the indigenous peoples for such utilization through Free, Prior and Informed Consent before utilization takes place and shall be consistent with the protection of intellectual property rights.[1381]

These new P&C will be phased in over the coming years, when generic indicators that further specify the new P&C will be developed. They broaden the scope of the right to FPIC and are more specific about in which situations FPIC is required.[1382] The new P&C also provide a definition of FPIC based on the 2005 Workshop conclusions, discussed earlier:

> **Free, Prior, and Informed Consent:** A legal condition whereby a person or community can be said to have given consent to an action prior to its commencement, based upon a clear appreciation and understanding of the facts, implications and future consequences of that action, and the possession of all relevant facts at the time when consent is given. Free, prior and informed consent includes the right to grant, modify, withhold or withdraw approval.[1383]

In the new P&C 'Free, Prior and Informed Consent' is mentioned, thereby bringing the terminology in alignment with the UNDRIP. Furthermore, it is specifically acknowledged that the organization has to respect indigenous rights

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[1381] FSC international standard, FSC Principles and Criteria for Forest Stewardship, Fsc-Std-01-001 (version 5-0) En, 2012. Emphasis added.
[1382] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 6.
[1383] FSC international standard, FSC Principles and Criteria for Forest Stewardship, Fsc-Std-01-001 (version 5-0) En, 2012, p. 27.

derived from ILO Convention No. 169 and the UNDRIP, thereby making the standards applicable to countries that have not ratified or adopted the mentioned instruments.[1384]

Moreover, the new P&C unambiguously state that the organization has to identify indigenous peoples and their rights (legal or customary) to their lands and resources, as well as their right to control forest management. Control can only be delegated through an FPIC process that has to lead to a binding agreement (Principle 3.3.). This agreement has to include the project's duration, provisions for renegotiation, renewal, termination, economic conditions, and other terms and conditions. This way the new P&C include strong duties for the organization to make sure that indigenous peoples' rights are respected. It also provides a more detailed explanation of when FPIC is needed and what an FPIC agreement should include.

Additionally, the new P&C also confer the right to FPIC to local communities in its revised Principle 4. The scope of FPIC is therefore expanded to include other communities that may have similar characteristics and interests as indigenous communities.[1385] Earlier on it was described that the Inter-American Court took a pragmatic approach towards the applicability of indigenous rights for other similarly affected communities, foremost in the Saramaka case.

In sum, the revised P&C significantly strengthen the rights of indigenous peoples with regard to control over forest management. FPIC must be sought in two situations: first, to determine if the indigenous community that has legal or customary rights to land or resources in or near the forest operation, and that may be affected by the activity, agrees to the proposed project. Second, FPIC processes must be started when a certified organization intends to use the traditional knowledge of indigenous peoples.[1386] Besides being in line with the UNDRIP, this second situation is in line with the requirements of the CBD's article 18(j). In order to effectively implement these strengthened FPIC requirements, FSC developed an extensive guidance document under the auspices of Leo van der

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[1384]That is, applicable with regard to forestry operations with FSC certification. FSC certification thus requires respect for the latest international norms, this may differ substantially from what is positive law in a particular state.

[1385] In the Guidelines *local communities* are defined as: "Communities of any size that are in or adjacent to the Management Unit, and also those that are close to enough to have a significant impact on the economy or the environmental values of the Management Unit or to have their economies, rights or environments significantly affected by the management activities or the biophysical aspects of the Management Unit." Indigenous peoples are defined in line with the ILO 169 definition. Furthermore, the Guidelines Glossary of Terms also mention '*traditional peoples*' who are described as: "Social groups or peoples who do not self-identify as indigenous and who affirm rights to their lands, forests and other resources based on long established custom or traditional occupation and use. See: FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, pp. 67-68. One could think of for instance certain communities of African descent in Latin America.

[1386] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 17.

Vlist and Wolfgang Richert.[1387] This document establishes a six step implementation model.

The 2012 Guidelines on FPIC

FPIC is not an isolated requirement in FSC's new P&C, but it is to be implemented taking into account a large number of other principles and criteria as well.[1388] The guidelines incorporate these other standards in the six step process.

According to principle 3, the rights of indigenous peoples to control their lands and resources must be respected. Claims to these rights must be based on "long established use" and must be "fair and legitimate." Both these terms may lead to conflicting interpretations. [1389]

Moreover, FPIC processes should result in a binding agreement, while taking into account that an important goal of such agreements should be to establish an ongoing relationship based on mutual trust between indigenous peoples and other involved actors (mainly the organization).[1390] The organization is also encouraged to use a precautionary approach and to respect – and utilize – indigenous peoples' traditional knowledge.

The mentioned goals are to be met following these six steps:

1. Identify rights holders and their representative institutions
2. Prepare for further engagement with identified communities
3. Map rights, resources, lands and territories and assess impacts
4. Inform affected indigenous and local community rights holders
5. Negotiate and let community decide on negotiated FPIC proposal
6 Formalize, verify, implement and monitor the consent agreement

These steps are illustrated in the following scheme:[1391]

1387 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012.

1388 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 19

1389 What is considered 'fair and legitimate' varies, since it is dependent on a large number of factors determined by the specific context of the situation at hand. 'Long and established use' similarly may be applied and interpreted differently in different contexts. See: FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 22.

1390 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 21. This is fully in line with the preamble and 'spirit' of the UNDRIP.

1391 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 26.

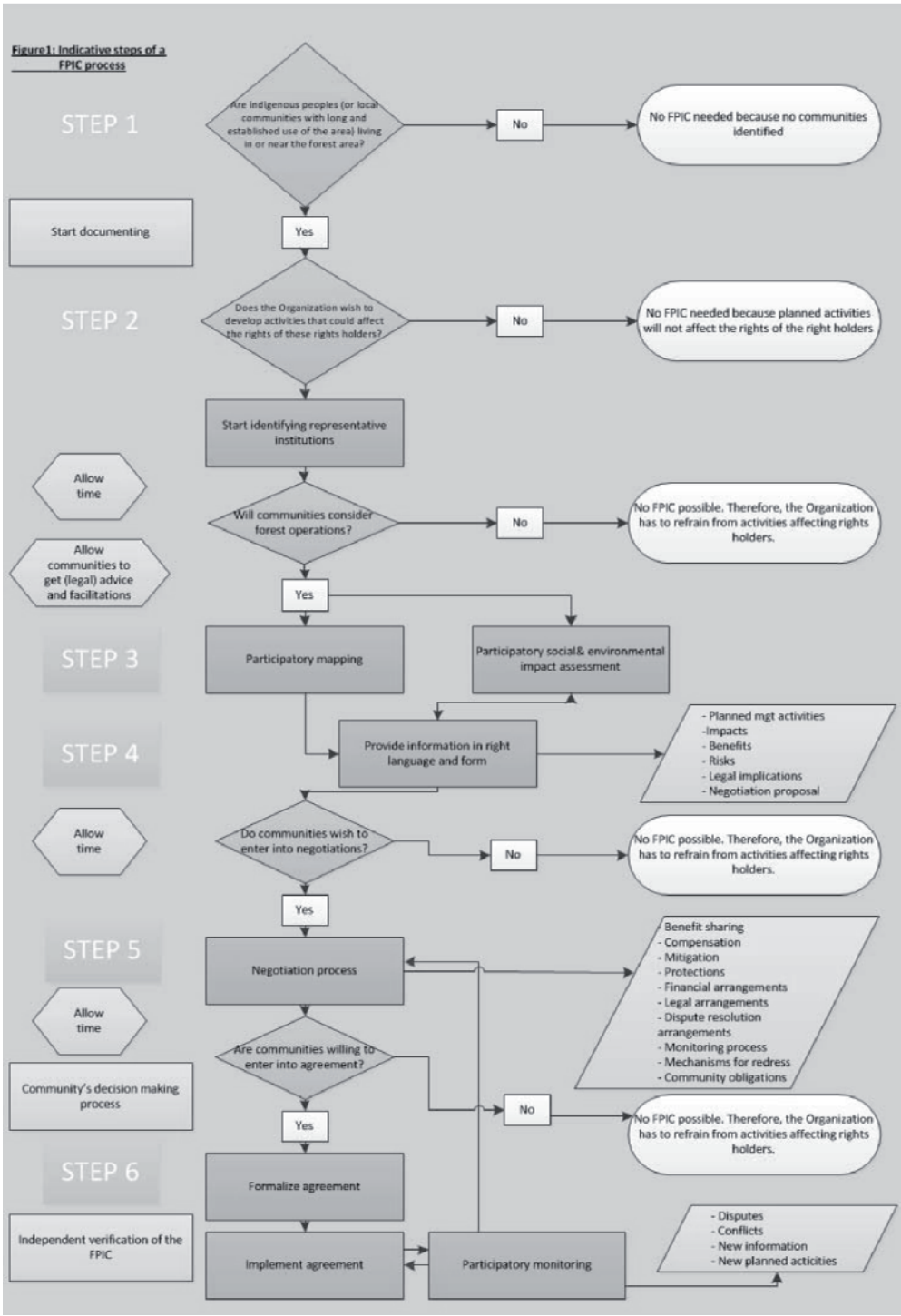
Figure1: Indicative steps of a FPIC process
STEP 1
Are indigenous peoples (or local communities with long and established use of the area) living in or near the forest area?
No
No FPIC needed because no communities identified
Start documenting
Yes
STEP 2
Does the Organization wish to develop activities that could affect the rights of these rights holders?
No
No FPIC needed because planned activities will not affect the rights of the right holders
Start identifying representative institutions
Allow time
Will communities consider forest operations?
No
No FPIC possible. Therefore, the Organization has to refrain from activities affecting rights holders.
Allow communities to get (legal) advice and facilitations
Yes
STEP 3
Participatory mapping
Participatory social& environmental impact assessment
STEP 4
Provide information in right language and form
- Planned mgt activities
-Impacts
- Benefits
- Risks
- Legal implications
- Negotiation proposal
Allow time
Do communities wish to enter into negotiations?
No
No FPIC possible. Therefore, the Organization has to refrain from activities affecting rights holders.
Yes
STEP 5
Negotiation process
- Benefit sharing
- Compensation
- Mitigation
- Protections
- Financial arrangements
- Legal arrangements
- Dispute resolution arrangements
- Monitoring process
- Mechanisms for redress
- Community obligations
Allow time
Are communities willing to enter into agreement?
Community's decision making process
No
No FPIC possible. Therefore, the Organization has to refrain from activities affecting rights holders.
Yes
STEP 6
Formalize agreement
Independent verification of the FPIC
Implement agreement
Participatory monitoring
- Disputes
- Conflicts
- New information
- New planned acticities

The FSC guidelines entail a very practical approach and checklist for execution of an FPIC process. A summary of the most important elements of each of the six steps will be provided next.

Step 1. Identify rights holders and their representative institutions

Regarding step 1, the organization takes the initiative to identify which indigenous peoples or other communities reside in proximity of the forest management unit and whether their rights, resources, and lands or territories may be affected by the operation.[1392] Next, it is up to the organization to examine if the potentially affected communities want to consider the proposed project. In order to do this, the organization needs to identify how the communities' decision-making system is structured and they need to agree on a method that includes all members of the different communities.[1393]

The representatives of the communities then have to be informed – in a culturally appropriate form – about the proposed forestry operation and about its possible impact on rights, lands, and resources.[1394] In the FSC implementation model, it is also important to inform the communities that they are free to say "no" to the proposal, this way a strong interpretation of FPIC is implemented in the guidelines.[1395] This means that if a community does not want to consider a project, the organization must refrain from further action that may impact the communities involved.[1396] If the communities do want to consider the project, it is time for step 2.[1397]

Step 2. Prepare for further engagement with identified communities

Preparations that have to be taken in order to facilitate further engagement with the communities require a number of activities. The organizations should establish a multi stakeholder working group in which all relevant actors are included. Furthermore, an internal structure for effective interaction with the communities must be developed.[1398] It is made clear in the guidelines that – as

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1392 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 28. The Guidelines state that it is to be advised to involve NGO's and other experts in this phase.

1393 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 28.

1394 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 28.

1395 In a specific context, it may of course be easier to require full consent. Generally, and as the Special Rapporteur has noted, the scope of consent may be broader.

1396 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 28.

1397 The (expansive) guidelines include a checklist for each step as well as a detailed commentary on how to implement each step.

1398 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 29.

was discussed throughout this study – the amount of effort that has to go into an FPIC process will depend on the scale, intensity and risk of the proposed forestry operations. It is also advised to agree with the different parties on an independent third party to verify the process from the earliest stages.[1399]

The organization must also establish a well-developed communication and information strategy to make sure that the "informed" criterion is met.[1400] FSC acknowledges that informing is far broader than merely explaining to the community what the plans are, since it also involves delicate and time-consuming communicative transactions between culturally diverging actors and stakeholders.[1401]An important point in step 2 is that the organization also has to find out if, and to what extent, the government already has an FPIC strategy or legal framework. This way, the organization can find out to which additional steps are needed in order to fulfill the strong FSC criteria.[1402] When the activities that may have an impact on the identified communities are sufficiently defined, a realistic and flexible timeline has to be developed in order to adequately inform the involved communities.[1403]

Step 3. Map rights, resources, lands and territories and assess impacts

The third step involves the complex process of mapping the rights, lands, and resources concerned, and assessing the possible impact that the proposed activity may have on these. The guidelines refer to procedures for participatory mapping and participatory impact assessment as the preferred methods.[1404] Participatory mapping means that the organization and communities jointly identify all those elements relevant for the FPIC process and indicate those on a map.[1405] Technologies for mapping like GPS are becoming more and more accessible and together with traditional knowledge of the areas may lead to accurate and detailed charts of the territories involved. The process of participatory impact assessment refers to the model of the Akwé: Kon Guidelines, described above, in which environmental, social, and cultural impact assessments are to be integrated

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1399 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 29.
1400 See paragraph III.3.3.
1401 According to the standards and criteria for successful communicative transactions explored in paragraph III.3.3.
1402 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 29.
1403 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 29.
1404 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 30.
1405 FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 48. Important elements to map include: sacred sites, tenure patterns, land usage etc. but also the exact scope of the activity that the organization proposes.

and in which local and indigenous communities have an important part to play.[1406]

For this step, it is essential that the communities have sufficient time, knowledge, training, and skills and that all segments of the community are involved to prevent possible future conflicts.[1407] Conflicting claims may arise nonetheless, and it is up to the organization to devise an appropriate dispute settlement mechanism.[1408] When the mapping is completed, the organization is to engage and agree with the communities to adapt the earlier developed plan and approach according to the findings of the mapping and impact assessment processes.[1409]

Step 4. Inform affected indigenous and local community rights holders

When the management plan is adapted according to the outcome of the mapping process and the impact assessment is finalized, it is time to inform the affected communities more formally about the forest management activities that the organization is proposing.[1410] Information and communication are again the keywords during this phase. The organization has to provide the affected communities with all relevant information concerning the proposed operation in a way that is understandable, both in language and in form.[1411] Again, the community will need sufficient time to deliberate and come to a genuinely informed decision. It is important to secure that the community members fully understand the potential benefits and costs of the project. Then, the community will decide if they want to enter into negotiations with the organization about the forestry activities.[1412]

Step 5. Negotiate and let community decide on negotiated FPIC proposal

In preparation of the consent agreement, the organization will have to make sure that there is indeed an agreed and inclusive decision-making model and that the communities involved have the necessary capacity to enter into negotiations

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[1406] Also see: FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 79.
[1407] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 30.
[1408] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 30.
[14091409] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 30.
[1410] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 31.
[1411] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 31.
[1412] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 31.

about the activities.[1413]The negotiation process that follows involves mitigation of the negative impacts, compensation of unavoidable damages, benefit-sharing solutions, and further needed financial and legal arrangements. If the parties agree, grievance mechanisms and monitoring models should be developed.[1414] This is essential to secure that FPIC is not a "single moment decision" but rather a continuous process that may involve revision of the existing arrangements.[1415]

After this, a consent agreement is drafted in which all of these elements are included. Then the community decides whether they give or withhold their consent, or if they would like to modify the existing agreement. In this phase, it is important to verify that the decision is made freely, accurately informed, and with sufficient time and capacity.[1416]

Step 6. Formalize, verify, implement and monitor the consent agreement

The final step in the FSC process is to appropriately formalize the consent agreement. The outcome should be made publicly available – if the community desires this – and the process should be verified by an independent party.[1417]

Subsequently, the consent agreement is implemented and monitored according to the arrangements that were made. The guidelines – correctly – indicate that even during this phase, changing policies, circumstances, or new information may re-open negotiations or even lead to withdrawal of consent. It is conceded in the guidelines that: "FPIC remains an iterative process and requires a continuous dialogue between the organization and the affected rights holders, to manage conflicts and to find solutions."[1418] Monitoring and grievance mechanisms are therefore essential to secure that the FPIC agreement is implemented correctly.

Conclusions on the FSC Model

The FSC Guidelines for the implementation of free, prior and informed consent contain one of the most elaborate models for preparing, negotiating and monitoring FPIC arrangements in relation to sustainable forestry operations in areas where indigenous peoples reside. Although consent requirements have been present in the FSC's principles and criteria since 1994, there is remarkably

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[1413] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 32.
[1414] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 32.
[1415] See amongst others paragraph III.3.2 on prior, where it was already argued that FPIC is not just important prior to decision-making.
[1416] In compliance with the criteria for free, prior and informed consent identified in this study.
[1417] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 33.
[1418] FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), Technical Series No. 2012-2, Version 1, October 2012, p. 33.

little documentation available about its implementation. In the new 2012 P&C the scope of the FPIC requirements is adjusted and broadened in line with contemporary international law. In the P&C UNDRIP, ILO 169, and the CBD are explicitly referred to as those documents in which the relevant norms can be found. Furthermore, the FSC Guidelines on FPIC draw on international documents and reports and decisions from the ILO, CERD, HRC, CESCR, ACHPR, and the IACtHR. This way, the FSC's guidelines show a commitment to uphold international law and aim to bring FSC's policy in line with what is emerging as an international consensus on FPIC.

Nevertheless, since the FSC certificate is a voluntary standard it may also go beyond what is legally required. FPIC is explained in the guidelines as also including a straight forward right to "say no" to forestry operations, and its scope is broadened to include local communities as well as indigenous peoples. The guidelines are also in line with other implementation guides on FPIC, foremost with the guidelines in the framework of the UN REDD Programme discussed above. Moreover, in the guidelines the Akwé: Kon Guidelines on impact assessments are referred to for regulating the different impact assessments that are needed to come to a genuinely informed decision about the planned projects.

What is particularly attractive about the FSC's guidelines on FPIC is that they strike a balance between regulating and standardizing FPIC requirements on the one hand, while leaving enough space to negotiate flexible, tailor-made FPIC agreements on the other.[1419] The different steps in the process seem to provide enough guidance for participating organizations to include FPIC in their policy, but also continuously remind us of the flexible understanding that is necessary for implementing FPIC in a wide variety of cultural, social, economic, and environmental situations.

However, up till now, there are virtually no best practice studies on the implementation of FPIC in the framework of the Forest Stewardship Council. The new P&C will gradually be applied over the coming period and the FSC has planned six FPIC Pilot Projects in order to create know-how and best practices on the implementation of FPIC.[1420] These pilot programmes may be invaluable in examining the effectiveness of the FPIC implementation model the FSC is proposing.

Obtaining FPIC from indigenous and local communities is a key requirement for certification of forestry operations in the framework of FSC. The new P&C and the Guidelines for implementation have the aim to bring the FPIC requirement in line with international law and other voluntary initiatives containing FPIC requirements. While it is too early to say much about the effectiveness of the FSC model, it is a positive development that different best

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[1419] That is, in theory, since almost no case studies on the implementation of the guidelines are available.

[1420] The planning of these six FPIC Pilots is still in a very early stage and there is no documentation available yet. FSC is planning these Pilots in different regions of the world, amongst others in Canada, the Russian Federation, Latin-America, Asia and Africa. To little is known about these Pilots to elaborate on them further at this moment.

practice or case studies are being developed. Voluntary initiatives like FSC may go beyond what is strictly speaking legally required, but also adhere to the international legal standard-setting on FPIC.[1421] The proposed implementation model focuses on continuous dialogue with indigenous communities and entails strong information and communication requirements before and after formalizing an FPIC agreement about sustainable forest management.

V.2.4 Other Voluntary Standards

In addition to the guidelines discussed above – in the framework of the CBD, UN-REDD Programme and FSC – there are a number of other voluntary standards that incorporate consent requirements. A limited overview will be given in this paragraph.[1422] Most of these "commodity roundtables" have developed their own standards for certifying and auditing participating corporations.[1423] This paragraph will briefly explore standard-setting in relation to FPIC in the Roundtable on Sustainable Palm Oil (RSPO),[1424] the Roundtable on Responsible Soy (RTRS),[1425] and the Roundtable on Sustainable Biomaterials (RSB).[1426] Another, different organization that will be treated is the International Council on Mining and Metals (ICMM), which has developed guidelines for indigenous peoples and FPIC in the mining sector.[1427]

The Round Table on Sustainable Palm Oil (RSPO)

The RSPO was founded in 2003 in Kuala Lumpur, Malaysia, after an inaugural meeting in which the statement of intent was signed by the participating organizations. Its formal establishment took place in 2004 under Article 60 of the Swiss Civil Code, adopting a governance structure that has the aim of ensuring effective participation and representation of all stakeholders throughout

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1421 Which is often more than can be said about national legislation in this respect.

1422 Colchester, Chao, Jiwan, *Securing rights trough commodity roundtables? A comparative review*, Pre-Conference draft, Forest Peoples Programme, 2012. Another example of a guide to FPIC designed specifically for indigenous communities is: Oxfam Australia, Guide to Free Prior and Informed Consent, June 2010.

1423 Colchester M, Chao S, Jiwan N, 'Securing rights trough commodity roundtables? A comparative review', Pre-Conference draft, Forest Peoples Programme, 2012, p. 6.

1424 http://www.rspo.org/.

1425 http://www.responsiblesoy.org/index.php?lang=en.

1426 http://rsb.org/.

1427 Other voluntary standards in which consent requirements are (marginally) elaborated upon are BonSucro and the Shrimp Aquaculture Dialogue. See: http://bonsucro.com/site/ and http://www.asc-aqua.org/index.cfm?act=tekst.item&iid=7&iids=239&lng=1.
These initiatives do not have explicit references to FPIC. For an overview of the relevant standards in relation to indigenous peoples, see: Colchester, Chao, Jiwan, *Securing rights trough commodity roundtables? A comparative review*, Pre-Conference draft, Forest Peoples Programme, 2012.

the supply chain.[1428] The RSPO's organization structure includes a General Assembly, Executive Board, Secretary General, and a number of associated committees and working groups.[1429]

Its vision is to transform markets so that sustainable palm oil is the norm. To accomplish this, the RSPO advances the production, procurement, finance, and use of sustainable palm oil products. It aims to develop, implement, verify, assure, and review credible global standards along the chain of supply and monitors the economic, environmental and social impacts of the uptake of sustainable palm oil in the market.[1430] Furthermore, its mission is to engage and commit all stakeholders in the process.[1431]

Palm oil is an edible vegetable oil that can be harvested from the fruit of the oil palm. In recent years palm oil has become more and more popular since the global demand for vegetable oil is growing fast. Palm oil is relatively cheap, very versatile in application, high yielding, and easy to produce and harvest.[1432] Unfortunately, palm oil plantations often take the place of primary rain forest and indigenous communities residing in the area.

Similar to for instance the FSC, the RSPO operates following a number of principles and criteria. In brief, the eight principles that palm oil growers have to adhere to in order to become certified are:

1. Commitment to transparency
2. Compliance with applicable laws and regulations
3. Commitment to long term economic and financial viability
4. Use of appropriate best practices by growers and millers
5. Environmental responsibility and conservation of natural resources and biodiversity
6. Responsible consideration of employees and of individuals and communities affected by growers and mills
7. Responsible development of new plantings
8. Commitment to continuous improvement in key areas of activity[1433]

In relation to indigenous peoples and local peoples, the terminology used in the RSPO's P&C, It is mentioned in Principle 2 that use of the land for palm oil does not diminish the legal, customary, or user rights of other users without their free prior and informed consent.[1434] Indicators for this include the

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1428 www.rspo.org/en/history.
1429 www.rspo.org/en/organization_structure.
1430 www.rspo.org/en/vision_and_mission.
1431 www.rspo.org/en/vision_and_mission.
1432 www.rspo.org/en/who_is_rspo.
1433 RSPO, *Principles and Criteria for the Production of Sustainable Palm Oil*, 2013, accepted by the RSPO Executive Board for the Extraordinary General Assembly on April 25th 2013.
1434 RSPO, *Principles and Criteria for the Production of Sustainable Palm Oil*, 2013, accepted by the RSPO Executive Board for the Extraordinary General Assembly on April 25th 2013, p. 12. *Cf.* Colchester M, Chao S, Jiwan N, 'Securing rights trough commodity roundtables? A comparative review', Pre-Conference draft, Forest Peoples Programme, 2012.

requirement for adequate maps of the areas involved, again following a process of participatory mapping. Furthermore, all relevant customary or user rights need to be identified.[1435] Principle 7.5 and 7.6 state the need for FPIC most clearly:

> Principle 7.5
>
> No new plantings are established on local peoples' land where it can be demonstrated that there are legal, customary or user rights, without their free, prior and informed consent. This is dealt with through a documented system that enables these and other stakeholders to express their views through their own representative institutions.
>
> Principle 7.6
>
> Where it can be demonstrated that local peoples have legal, customary or user rights, they are compensated for any agreed land acquisition and relinquishment of rights, subject to their free, prior and informed consent and negotiated agreements .[1436]

The accompanying indicators clarify that in the view of the RSPO, FPIC means that indigenous peoples have the right to say "no" to operations on their lands. This right applies before and during initial discussions, but also during the stage of information gathering and associated consultations, during negotiations, and up until an agreement with the growers or millers is signed and ratified by the local communities or indigenous peoples involved.[1437]

Moreover, social and environmental impact assessments a required. Furthermore, it is stated that: "Free, prior and informed consent (FPIC) is a guiding principle and should be applied to all RSPO members throughout the supply chain."[1438]

With regard to compensation, in the indicators accompanying principle 7.6 it is stated that it is necessary to develop a system for the identification of people

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[1435] RSPO, *Principles and Criteria for the Production of Sustainable Palm Oil*, 2013, accepted by the RSPO Executive Board for the Extraordinary General Assembly on April 25th 2013, p. 12.
[1436] RSPO, *Principles and Criteria for the Production of Sustainable Palm Oil*, 2013, accepted by the RSPO Executive Board for the Extraordinary General Assembly on April 25th 2013, p. 53.
[1437] RSPO, *Principles and Criteria for the Production of Sustainable Palm Oil*, 2013, accepted by the RSPO Executive Board for the Extraordinary General Assembly on April 25th 2013, p. 53.
[1438] RSPO, *Principles and Criteria for the Production of Sustainable Palm Oil*, 2013, accepted by the RSPO Executive Board for the Extraordinary General Assembly on April 25th 2013, p. 53. Reference is made to the 2008 guidelines developed by the Forest Peoples Programme: *Free, Prior and Informed Consent and the Roundtable on Sustainable Palm Oil, A Guide for Companies*, FPP, 2008. This guide provides a short overview of FPIC in international law and developes some principles and steps that companies should consider when implementing FPIC processes in the framework of sustainable palm oil.

entitled to compensation, and that the affected communities have access to information and independent advice concerning the legal, economic, environmental, and social implications of the proposed projects.[1439] In the specific guidance it is explicitly stated that: "Growers and millers will confirm that the communities gave consent to the initial planning phases of the operations prior to the new issuance of a concession or land title to the operator."[1440]

The 2013 Principles and Criteria of the Round Table on Sustainable Palm Oil integrate a strong requirement of FPIC as the central demand when palm oil plantations are created near indigenous communities. Integration of participatory mapping, social and environmental impact assessments, and strong FPIC requirements as well as compensation provisions indicate that the RSPO is committed to respecting indigenous peoples' rights to a high level. This is also needed, since the rapid expansion of palm oil plantations threatens the rainforest and the lands and territories of many indigenous communities. Unfortunately, *sustainable* palm oil is still the exception.[1441]

The Round Table on Responsible Soy (RTRS)

The Round Table on Responsible Soy is the second initiative discussed here that includes FPIC requirements. The RTRS, like the RSPO is a multi-stakeholder initiative which facilitates an international dialogue to make the production of soy economically viable, socially equitable, and environmentally sound.[1442] It provides stakeholders and interested parties with the opportunity to develop global solutions for the responsible production of soy.

Soybeans are a species of legume native to East Asia, widely grown for its edible beans and multiple uses. Soybeans are a cheap and easy to produce source of protein for animal feeds and human food products, like soy milk and tofu. Soy bean production is expanding rapidly and threatens parts of the rainforest, especially in the Amazon region.[1443] This speedy expansion creates a strong need to produce soybeans in a sustainable manner.

The RTRS members commit themselves to a global standard for the production of responsible soy. Producers, industry, and civil society organizations may become participating members while other organizations such

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[1439] RSPO, *Principles and Criteria for the Production of Sustainable Palm Oil*, 2013, accepted by the RSPO Executive Board for the Extraordinary General Assembly on April 25th 2013, p. 54.
[1440] RSPO, *Principles and Criteria for the Production of Sustainable Palm Oil*, 2013, accepted by the RSPO Executive Board for the Extraordinary General Assembly on April 25th 2013, p. 54.
[1441] Recall the large forest fires in Indonesia, created to illegally burn down large parts of tropical rainforest in order to free op land for the creation of palm-oil plantations.
[1442] www.responsiblesoy.org.
[1443] Berkum, S van and Bindraban P S (eds.) 'Towards sustainable soy; An assessment of opportunities and risks for soybean production based on a case study Brazil', Report 2008&080, Wageningen UR, 2008, p. 3.

as auditing firms, academia, and donors may acquire the status of observing members.[1444]

The main instrument of the RTRS is the dialogue between groups with different interests and backgrounds, in order to explore and determine common ground for action. Its mission is to:

> Encourage that current and future soybean is produced in a responsible manner to reduce social and environmental impacts while maintaining or improving the economic status for the producer.[1445]

The RTRS aims to achieve this through the development, implementation, and verification of a global standard and the commitment of its members involved in the entire value chain of soybean.[1446] The RTRS describes its vision as follows:

> That soy help to meet social needs, environmental and economic consequences of the present generation without compromising the resources and the welfare of future generations and allowing the construction of a better world through consensus and joint action.[1447]

The key objectives of the RTRS, in addition to facilitating the dialogue, are to reach consensus among the stakeholders linked to the soy industry, develop a standard of sustainability for the production, trading, and use of soy, and to act as an internationally recognized forum for the monitoring of global soy production in terms of sustainability.[1448]

The RTRS principles and criteria demand documented communication and dialogue with local communities and the resolution of use rights disputes through a comprehensive, participatory, and documented community rights assessment.[1449] Although there is no clear definition of FPIC in the RTRS principles and criteria, it is required in principle 3.2.2 that: "Where rights have been relinquished by traditional land users there is documented evidence that the affected communities are compensated subject to their free, prior, informed and documented consent."[1450]

With the increasing demand for soy, the need for a strong standard on its sustainable use is pressing. Soy plantations threaten the livelihoods of many

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[1444] www.responsiblesoy.org.
[1445] www.responsiblesoy.org
[1446] www.responsiblesoy.org.
[1447] www.responsiblesoy.org.
[1448] www.responsiblesoy.org.
[1449] RTRS Principles and Criteria for Responsible Soy Version 1.0, ITG1-OUT-01-ENG, Date 22 April 2010, Principle 3.1 and 3.2.
[1450] RTRS Principles and Criteria for Responsible Soy Version 1.0, ITG1-OUT-01-ENG, Date 22 April 2010, Principle 3.2.2.

indigenous groups, especially in the Amazon region, and large parts of primary rainforest are disappearing in order to make place for soybeans. The standards that the RTRS set in relation to FPIC are underdeveloped if compared to the FSC and UN-REDD implementation models. There are few references to international law and not much guidance on the implementation of FPIC processes is available. Nevertheless, the RTRS principles and criteria are relatively young – they were drafted in 2010 – so the coming years will hopefully lead to a more developed model. Creating a dialogue on the responsible and sustainable production of soy, including FPIC requirements, is to be encouraged.

The Round Table on Sustainable Biofuels (RSB)

The RSB, like the other initiatives examined here, is a multi-stakeholder initiative that brings together farmers, companies, NGO's, experts, governments and IGO's who operate in the field of sustainable biomass production.[1451]Biofuels – like ethanol and biodiesel – are generally seen as a good alternative for oil based fuels, but there is also a lot of criticism.[1452] Biofuels may lead to adverse impacts on the environment, food security, and land use. The challenge therefore is to create a biofuel production that is based on responsible policies to ensure that its commercialization is sustainable.[1453]

The RSB acknowledges that in order to achieve such a sustainable production chain, it is necessary to develop a global standard and platform for discussion. Its vision is to create a global sustainable production, conversion, and use of biomass. To achieve this the RSB endeavors to: (1) provide and promote the global standard for socially, environmentally, and economically sustainable production and conversion of biomass, (2) provide a global platform for multi-stakeholder dialogue and consensus building, (3) ensure that users and producers have access to credible, practical, and affordable certification, and (4) support continuous improvement through application of the standard.[1454]

The RSB 2010 Principles and Criteria entail FPIC requirements in Principle 2, 9, and 12. In Principle 2 it is stated that: "Sustainable biofuel operations shall be planned, implemented, and continuously improved through an open, transparent, and consultative impact assessment and management process and an economic viability analysis."[1455] In Criterion 2b it is explained that: "Free, Prior

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1451 www.rsb.org.

1452 The leading opinion is that biofuels will help to reduce dependency on fossil fuels and that it may address global warming, but only in specific cases and if it is produced and used in a sustainable manner.

1453 Biofuels are fuels that use energy from carbon-fixation. Biomass, derived from (food)plants like sugar cane, wheat, maize and palm oil, is converted into energy. This may be in liquid, solid or gas form.

1454 www.rsb.org. Vision and mission statement for the RSB (as of november 5, 2010).

1455 RSB Principles & Criteria for Sustainable Biofuel Production, RSB reference code: [RSB-STD-01-001 (Version 2.0)], 2010, Principle 2.

& Informed Consent (FPIC) shall form the basis for the process to be followed during all stakeholder consultation, which shall be gender sensitive and result in consensus-driven negotiated agreements."[1456] In the Guidance on the P&C it is stated that this means that the stakeholder engagement process for an impact assessment must: "seek to build consensus and strive to ensure that the final recommendations of the impact assessment process are acceptable to and supported by the directly affected stakeholders."[1457] This definition of FPIC seems somewhat "lighter" than the definitions used by the FSC, RSPO, and in the framework of the UN-REDD Programme. Nevertheless, the RSB does not explicitly refer to indigenous peoples as the only ones benefitting from FPIC processes, thereby acknowledging that other affected communities should also be consulted in a similar way. Moreover, the RSB refers to ILO Convention No. 169, the UNDRIP, and the CBD as applicable international law in the Guidance on Principle 1: Legality.[1458]

Further reference to FPIC can be found in Principle 9 about water resources under legitimate dispute and in Principle 12 about legitimate disputes over land rights.[1459] Importantly, in Criterion 12.b. it is stated that: "Free, Prior, and Informed Consent shall form the basis for all negotiated agreements for any compensation, acquisition, or voluntary relinquishment of rights by land users or owners for biofuel operations."[1460] In the P&C's minimum requirements it is mentioned that no involuntary resettlement shall be allowed for biofuel operations. Furthermore, international and regional legal bodies are to be consulted if the rule of law is not adequately applied. Moreover, if there are disputes about the tenure agreements of the land among stakeholders, biofuel operations shall not be approved.[1461] This suggests that indigenous communities – or other stakeholders – may block biofuel projects when land disputes have not been adequately resolved.

Although the RSB contains a number of references to FPIC and the guidance on its Principles and Criteria require respect for the available international standards, the definition of FPIC seems a bit unclear and may have to be developed further in the near future to become an effective tool for indigenous communities that are affected by biofuel projects.

[1456] RSB Principles & Criteria for Sustainable Biofuel Production, RSB reference code: [RSB-STD-01-001 (Version 2.0)], 2010, Criterion 2b.
[1457] RSB Guidance on Principles & Criteria for Sustainable Biofuel Production, RSB reference code: [RSB-GUI-01-000 (Version 2.0)], p. 5.
[1458] RSB Guidance on Principles & Criteria for Sustainable Biofuel Production, RSB reference code: [RSB-GUI-01-000 (Version 2.0)], p. 4.
[1459] RSB Principles & Criteria for Sustainable Biofuel Production, RSB reference code: [RSB-STD-01-001 (Version 2.0)], 2010, Principle 9 and 12.
[1460] RSB Principles & Criteria for Sustainable Biofuel Production, RSB reference code: [RSB-STD-01-001 (Version 2.0)], 2010, Criterion 12.b.
[1461] RSB Principles & Criteria for Sustainable Biofuel Production, RSB reference code: [RSB-STD-01-001 (Version 2.0)], 2010, Criterion 12.b.1. Minimum requirements.

The International Council on Mining and Metals (ICMM)

Founded in 2001, the ICMM brings together a number of mining and metals companies as well as a number of national and regional mining and global commodity associations. Its goal is to improve the sustainable development performance in the mining and metals industry.[1462]

The ICMM engages with a broad range of stakeholders – governments, international organizations, academia, civil society and indigenous peoples – to build strategic partnerships. ICMM members are required to make public commitments to improve their sustainability performance on an annual basis. Its five core principles are: (1) care for the safety, health, and well-being of workers, contractors, host communities, and the use of the materials produced, (2) respect for people, the environment, and the values of host societies; (3) integrity as the basis for engagement with employees, communities, governments, and others; (4) accountability for upholding commitments made, (5) collaboration as an important tool for addressing the challenges and seizing the opportunities.[1463]

Indigenous peoples are often affected by mining operations, since precious sub-surface resources are often found in areas where indigenous communities reside. The ICMM acknowledges this and has developed a "good practice guide on indigenous peoples and mining" in order to build constructive partnerships between mining companies and indigenous peoples in 2010.[1464] Experiences of indigenous peoples with mining companies have been mixed and, more than occasionally, very negative. Nevertheless, FPIC requirements are gaining ground in the mining – and more broadly – in the extractive industries sector.[1465]

The good practice guide is intended for mining companies that want to engage in mining operations in areas where indigenous peoples reside. In the guide some guidelines on FPIC are enshrined but it does not go as far as the FSC and UN-REDD guidelines on the issue of consent. "Broad community support" is referred to and it is stated that the diverging positions on "a right to say no" precludes the ICMM to endorse this as a necessary element of FPIC.[1466]

However, the new 2013 position of ICMM on indigenous peoples and mining opens with emphasizing the central importance of FPIC in relation to mining operations that may affect indigenous peoples. Instead of "broad community support" and free, prior and informed consultation – familiar

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[1462] http://www.icmm.com/about-us/about-us

[1463] http://www.icmm.com/about-us/about-us

[1464] ICCM, Good practice guide on indigenous peoples and mining, London 2010. Also see: ICCM's position on indigenous peoples and mining, 2013. Available on the website icmm.com.

[1465] Doyle C and Cariño J, 'Making Free Prior and Informed Consent a Reality, Indigenous Peoples and the Extractive Sector', Middlesex University, 2013, p. 3. Doyle and Cariño argue that multinational mining corporations rarely comply with the standards necessary to respect indigenous peoples' rights, interests, and well-being.

[1466] ICCM, Good practice guide on indigenous peoples and mining, London 2010, p. 24.

terminology that is also included the World Bank's policy discussed earlier on – the new position of the ICMM is that:

> FPIC comprises a process, and an outcome. Through this process Indigenous Peoples are: (i) able to freely make decisions without coercion, intimidation or manipulation; (ii) given sufficient time to be involved in project decision making before key decisions are made and impacts occur; and (iii) fully informed about the project and its potential impacts and benefits. **The outcome is that Indigenous Peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting internationally recognized human rights** and is based on good faith negotiation. The commitments in this position statement relating to consent apply to new projects and changes to existing projects that are likely to have significant impacts on indigenous communities. The position statement will not apply retrospectively. Where both indigenous and non-indigenous peoples are likely to be significantly impacted, members may choose to extend the commitments embodied in this position statement to non-indigenous people.[1467]

The new position statement adjusts the old view and clearly indicates that indigenous peoples are indeed allowed to give and withhold their consent to mining operations. In the document the "Ruggie Principles" on Business and Human Rights, and ILO Convention 169 are referred to and it is far more in line with the FSC and UN-REDD guidelines discussed above.

Nevertheless, in the document it is also stated that:

> In most countries however, "neither Indigenous Peoples nor any other population group have the right to veto development projects that affect them," so FPIC should be regarded as a "principle to be respected to the greatest degree possible in development planning and implementation.[1468]

Hopefully, the new position, which will be mandatory to uphold for member companies from 2015, will promote effective FPIC processes between indigenous peoples and mining companies, since it is within the extractive industries sector that a large number of problems in relation to indigenous peoples arise.

[1467] Indigenous Peoples and Mining, Position Statement, ICCM, May 2013, p. 2.
[1468] Indigenous Peoples and Mining, Position Statement, ICCM, May 2013, p. 3.

Summary: Other Voluntary Standards

While the voluntary initiatives examined above do not have such a well developed implementation scheme as the FSC and UN-REDD Programme have, they do include FPIC requirements. The RSPO includes FPIC as one of its most important principles in its 2013 Principles and Criteria. Moreover, participatory mapping and integrated impact assessments are another important demand in producing sustainable palm oil. In the framework of the RTRS, FPIC requirements can also be found, although there is not much guidance yet on its implementation and little references to international law can be found in the RTRS' P&C. In the RSB Principles and Criteria it is stated that FPIC is the basis for stakeholder consultation procedures and they refer to ILO 169, the CBD and the UNDRIP as sources for legality. Nevertheless, the definition of FPIC seems somewhat unclear. The ICMM's new position statement seems to include a concept of FPIC that is similar to the FSC and UN-REDD Programme definitions. However, it is explicitly mentioned in the position statement that FPIC does not necessarily amount to a veto power. Especially in relation to extractive industries, clear and effective FPIC procedures have to be developed, since it is often in this area that indigenous peoples suffer most.[1469]

These different and important initiatives for sustainable production of commodities, as well as the ICMM – which aims to build a dialogue in which mining corporations and indigenous peoples can solve their differences – all have FPIC requirements included in their criteria. Nevertheless, they do not include extensive guidance on the implementation of FPIC. The earlier explored models in the framework of the FSC and the UN-REDD Programme offer far more practical guidance, and may be informative to other sustainability initiatives, especially when case studies will be developed in the near future. More intensive cooperation between the different initiatives will undoubtedly improve practical knowledge on the application of FPIC.

The next paragraph will discuss the experiences of the Orang Asli People of Peninsular Malaysia with sustainable forest management, in order to illustrate that a number of problems may arise when implementing these voluntary initiatives. After this examination, a number of general conclusions will be developed in which the role of these voluntary initiatives in shaping and promoting FPIC will be discussed

[1469] See for just one example the report on the Mindiro nickelmine in the Philippines. While the Philippines are one of the first and only countries that actually have FPIC requirements in their mining legislation, this does not mean that FPIC is indeed respected. See the OECD-WATCH report for numerous examples of what can go wrong in FPIC processes in relation to mining: http://oecdwatch.org/cases/Case_164.

V.2.5 Case: The Orang Asli of Peninsular Malaysia: Sustainable Timber Certification and FPIC

V.2.5.1 Introduction

The paragraphs on the case law of the Inter-American Court of Human Rights illustrated that conflicts and uncertainties about the interpretation of FPIC lead to problems regarding its implementation. As was explored in the previous paragraphs, FPIC is also a prominent requirement in voluntary certification schemes concerning sustainable forestry. These voluntary initiatives offer some of the most developed implementation models for FPIC processes. This paragraph will explore a practical example of the standard-setting and use of informed consent requirements in the context of such schemes by means of an analysis of the situation of the rights of the Orang Asli on the Malaysian Peninsula, in order to illustrate the complexity of implementing such schemes successfully.

First, an introduction on the Orang Asli, their rights and problems, and the relevant – national and international – legal framework will be provided. Subsequently, a deeper analysis of the debate surrounding the Malaysian certification body MTCC and the Dutch standards and criteria for sustainable timber will provide further understanding of the complexities regarding the implementation of FPIC. The paragraphs will illustrate how different and conflicting interpretations of FPIC lead to vast problems in relation to its implementation in a current case concerning sustainable forestry.

V.2.5.2 The Orang Asli of Peninsular Malaysia

The indigenous peoples of Malaysia are commonly referred to as "Orang Asal." The Orang Asli (Original Peoples) is the name for the indigenous minority of Peninsular Malaysia. They number around 170.000, representing about 0.5% of the population of Malaysia.[1470] The Orang Asli are usually divided into three sub-groups, the Negrito (Semang), the Senoi, and the Aboriginal Malay. These groups are further categorized into six different sub-groups.[1471] They speak different languages and dialects, and have varied occupations and ways of life. About 40% of the Orang Asli population lives close to or within forests in which they practice hill rice cultivation and some hunting and gathering. Furthermore, they engage in trading different forest products. A small number are still semi-nomadic, but the majority of Orang Asli practice permanent agriculture or manage their own small rubber or oil palm plantations. A substantial number of Orang Asli also live in or close to urban areas.[1472]

[1470] Nicholas C, Engi J and Teh Y P, *The Orang Asli and the UNDRIP, from Rhetoric to Recognition* (Centre for Orang Asli Concerns, 2010), p. 9. (Nicholas 2010/1)
[1471] Department of Orang Asli Development, JAKOA/JHEOA website: http://www.jakoa.gov.my/ Consulted 4 December 2011.
[1472] Nicholas (2010/1), p. 10.

The Orang Asli that live in the rainforest have a close physical, spiritual, and cultural relation to their lands. Their *adat* or customary land is considered a living object, which provides for everything they need for their survival. The lands provide food, clothing, medicine, and all other means necessary for their subsistence. According to Colin Nicholas, one of the leading experts on the Orang Asli:

> It is the land, more than anything else, which gives life and meaning to their whole being; for it is in the land that their history and identity are contained. It is also the land that ensures their viability as an independent people and provides for their social and cultural development. The Orang Asli therefore, not only have material dependence on the land but they also share a spiritual and emotional relationship with it.[1473]

Nicholas explained that a philosophy has evolved among the Orang Asli that comprises a strong reverence for the land and protects the continuous enjoyment thereof. This "ethos" is based on balance and harmony between humans and the environment, and between humans amongst each other.[1474] This implies that land cannot be bought or sold as if it were a commodity, and "ownership" is held collectively by the community.[1475] The principle behind this is that the Orang Asli people must maintain the precious balance between themselves and the environment.[1476]

Of course, not all Orang Asli nowadays uphold this belief, and some regard their territories as an economic source of income. Mainly external factors like the battle for resources, power inequalities and changing consumption patterns of the main population have profound effects on these communities, often disruptively altering their social structures. Nevertheless, the majority of the Orang Asli desire to use their customary territories in the traditional way.[1477]

Historically, the Orang Asli were allowed to retain their own economic and governance structures until the time of British rule, when they first experienced intrusive paternalistic policies.[1478] After the Second World War and the Japanese occupation, the Orang Asli played a major role in "the Emergency" that took place between 1948 and 1960.[1479] In this period the first piece of legislation pertaining to Orang Asli protection was enacted: The Aboriginal Peoples

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[1473] Nicholas (2010/1), p. 21.
[1474] Nicholas (2010/1), p. 22.
[1475] This concept of collective of communal property was extensively debated in paragraph II.2.1 on land and in paragraph V.1.2.3.1 on the Awas Tingi v. Nicaragua Case.
[1476] Nicholas (2010/1), pp. 22-23.
[1477] Nicholas (2010/1), p. 24.
[1478] In 1824 British hegemony in Malaya (the later Peninsular Malaysia) was formalized by the Anglo-Dutch Treaty, which divided the Malay archipelago between Britain and the Netherlands.
[1479] For an excellent historical survey, see Nicholas (2010/1), pp. 27-41.

Ordinance of 1954.[1480] The next paragraph will further explore Malaysia's legal framework.

Nowadays, the Orang Asli are amongst the most impoverished and marginalized of all Malaysians. About 50% of the Orang Asli live below the poverty line and about 19% are considered "hardcore poor." The poverty rate in Malaysia as a whole is 3.8%, and merely 0.7% qualifies as "hardcore poor."[1481]

The Orang Asli suffer from poor health conditions, absence of basic infrastructure, high school drop-out rates, and numerous other problems. The main government organization concerned with the Orang Asli, JHEOA, has been criticized heavily for not acting in the best interest of the Orang Asli.[1482] The main objections to JHEOA are that it is a rather paternalistic organization, that it is misrepresenting the Orang Asli; usurping traditional institutions and issuing policies that aim at assimilation instead of self-determined integration.[1483]

The main problem that Orang Asli communities face is undoubtedly the non-recognition of customary (*adat*) rights to their lands. Only 15% of the total area, that in the eyes of the authorities is Orang Asli land and is claimed by them, has been formally gazetted as Orang Asli reserves in accordance with the Aboriginal Peoples Act. The fact that these areas have not been given formal recognition is the source of most of the Orang Asli problems. Later on, when the Malaysian Timber Certification Council (MTCC) will be discussed, it will become clear that the non-recognition of indigenous land claims is also the key problem there. But first the Malaysian legal and political framework will be examined.

V.2.5.3 Malaysian Legal Framework and Judicial Decisions

Malaysia is a federation comprising 13 states and three federal territories with a strong central government and a division of executive and legislative powers between the federal and state governments.[1484] Important powers belonging to the states relate to: Islamic law, Malay and native customs, land, forestry, and the constitution and procedures of native courts. Malaysia's plural legal system can be seen as a combination of common law, syariah law and customary law traditions.

A number of legal and political instruments and court decisions deal in one way or another with the rights of indigenous communities in Malaysia. The Orang Asli are referred to as "aborigine" in Article 160(2) of the Federal Constitution of Malaysia.[1485] The natives from Sarawak and Sabah are explicitly

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[1480] It was revised in 1974, and renamed 'The Aboriginal Peoples Act'.

[1481] Nicholas (2010/1), p. 45. Statistics from Governmental 10th Malaysia Plan (2011-2015)

[1482] Jabatan Hal Ehwal Orang Asli (JHEOA), Department of Orang Asli Affairs. http://www.jakoa.gov.my/.

[1483] Nicholas (2010/1), pp. 48-49.

[1484] Bulan R, 'Indigenous Peoples and the Right to Participate in Decision Making in Malaysia', Discussion paper prepared for International Expert Seminar on Indigenous Peoples and The Right to Participate in Decision Making, Chiang Mai, Thailand, 20-22 January 2010.

[1485] Federal Constitution, Incorporating all amendments up to P.U.(A) 164/2009. First introduced as the Constitution of the Federation of Malaya on Merdeka Day: 31st August

given a special status and privileges in the constitution while the Orang Asli are not.[1486] The Constitution does provide that the Orang Asli aborigines are within the responsibilities and powers of the federal government. Nevertheless, matters in relation to land are under the purview of the individual states.[1487] This division of powers in practice leads to problems in effectively protecting Orang Asli lands and establishing land reserves.[1488]

The Aboriginal Peoples Act is the only legal instrument that is concerned specifically with the Orang Asli, and entails references to them as such.[1489] The act provides for the establishment of Orang Asli areas and reserves, but the common interpretation has been that the State has the power to order any community to leave any designated area. This leads to the situation where Orang Asli communities are at best seen as "tenants-at-will" and they do not have formal property rights.[1490] Furthermore, when displacement occurs, the State is not obliged to pay adequate compensation, it "may" only do so.[1491] No proper guidelines or protection mechanisms exist against the revocation of a declaration of an aboriginal reserve.[1492] In practice this meant that the Minister concerned, or his representative, the Director-General of JHEOA, had the final say in virtually all matters concerning the governance of the Orang Asli. Nicholas explained in his report to the Malaysian Human Rights Commission (SUHAKAM) that this included the appointment of a headman, entry or removal of people into Orang Asli settlements, and deciding on the name given to the different subgroups.[1493]

This narrow interpretation of the Aboriginal Peoples Act seems to be in favor of the interest of the authorities, although in its preamble it is stated that it is: "An Act to provide for the protection, well-being and advancement of the aboriginal peoples of West Malaysia." Nevertheless, a number of national court decisions and policy statements have sought to bring the interpretation of the Aboriginal Peoples Act in accordance with the Federal Constitution.

Another important document in relation to the Orang Asli, is the 1961 policy titled "Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia."[1494] The policy statement concerns a number of broad principles that aim to secure Orang Asli rights. Some of the most important are:

1957, Subsequently introduced as the Constitution of Malaysia on Malaysia Day : 16th September 1963.

1486 Federal Constitution, Article 153 and 161A.

1487 Federal Constitution, Ninth Schedule, Federal list No. 16 & 2.

1488 C Nicholas,'Orang Asli: Rights, Problems, Solutions' (SUHAKAM, 2010), p. 6. (Nicholas, 2010/2).

1489 Aboriginal Peoples Act 1954, Act 134, revised in 1974.

1490 Nicholas, (2010/2), p. 6.

1491 Aboriginal Peoples Act 1954, Act 134, revised in 1974, Section 12.

1492 Bulan R, 'Indigenous Land Rights in Malaysia', in: Engel J R, Westra L and Bosselmann K (eds), *Democracy, Ecological Integrity and International Law* (Cambridge Scholars Publishers, 2010), p. 186. (Bulan, 2010).

1493 Nicholas, (2010/2), p. 6.

1494 JHEOAS, 1961, Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia.

> [1(a)] The aborigines … must be allowed to benefit on an equal footing from the rights and opportunities which the law grants to the other sections of community…. **special measures should be adopted for the protection of institutions, customs, mode of life, person, property and labour of the aborigine people**.
>
> [1(b)] The social, economic, and cultural development of the aborigines should be promoted with the ultimate object of **natural integration** as opposed to artificial assimilation […] Due account must be taken of the cultural and religious values and of the forms of social control.
>
> [1(c)] The aborigines shall be **allowed to retain their own customs, political system, laws and institutions** when they are not incompatible with the national legal system.
>
> [1(d)] The special position of aborigines in respect of land usage and land rights shall be recognized …. Aborigines will not be moved from their traditional areas without their full consent.
>
> [1(j)] In all matters concerning the welfare and development of the aboriginal peoples, the Government will seek **the collaboration of the communities concerned or their representatives.**
>
> [2(iii)(a)] **In the implementation of forest conservation requirements, the special position of these communities is to be acknowledged** provided any relaxation exercised in their favour will not be detrimental to the effective and proper implementation of accepted Forest policy and objectives.[1495]

The Policy Statement has led to a number of programs and action plans by JHEOA in order to promote the goals mentioned. The statement is the only official policy still in force that governs the affairs of the Orang Asli, and it indicates in rather unambiguous terms how legislators should behave towards the Orang Asli.[1496] Moreover, it entails forest policies in favor of the Orang Asli, but its main aim is said to be the achievement of settled agriculture. Although the principles in the Statement are meant to give the Orang Asli greater powers over their traditional lands, the reality today is that they often find themselves living as squatters on state lands.[1497] The mechanisms for the gazettement of lands thus have

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[1495] JHEOAS, 1961, Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia. Cited in: Nicholas, (2010/2), pp. 10-12. Emphasis added.
[1496] Nicholas, (2010/2), p. 14. Noteworthy, the policy statement entails a requirement of consent in relation to the relocation of aboriginal people.
[1497] Bulan, (2010), p. 181.

not been effective in protecting Orang Asli rights. In recent years, the Orang Asli have brought their grievances to court.[1498]

Judicial Decisions

The Malaysian courts have been proactive in the interpretation and recognition of Orang Asli rights, which has led to a collection of arguably precedent-setting judgments.[1499]

The High Court of Ipoh ruled in 1992 in the case of *Koperasi Kijang Mas v. Kerajaan Negeri Perak* that the Government of Perak had violated the Aboriginal Peoples Act, when it allowed a company to harvest timber on places that had been approved by the State Government as aboriginal reserves.[1500] The Court held that the logging activities were prohibited and that only the Orang Asli have the right to the forest produce in these reserves. What is also important in this decision is that formal gazetting of the territories was not necessary to confer rights to the Orang Asli, where areas had already been approved. Approval alone was thus sufficient to create the reserves, and henceforth only the Orang Asli had exclusive rights to the forest products there. Only a small portion of the aboriginal lands that have been approved are formally gazetted.[1501]

The Johor High Court, in *Adong bin Kuwau & Ors v. State Government of Johor,* ruled that Orang Asli have a proprietary interest *on* the land and awarded compensation to the Jakun community for the loss of their ancestral lands.[1502] The Court held that the Jakun people have proprietary rights over their lands, but no inalienable interest in the land itself. This meant that no formal title is held, but that nevertheless rights to use the land for subsistence and other needs exist.[1503] The Court stated that aboriginal peoples had the right to continue to live on their lands, as their forefathers had lived. The decision was based on Article 13 of the Federal Constitution and upheld in 1998 by the Court of Appeal.[1504]

The Sagong Tasi Cases: Aboriginal Title in Malaysia

The reasoning in *"Adong"* was enforced and expanded by the judgment in the

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[1498] Bulan, (2010), p.181.
[1499] Nicholas, (2010/2), p. 7. Nicholas explains that although some cases favor indigenous rights and are in line with the spirit of the UN Declaration, these are not always followed in other judgments. Nicholas (2010/1), p. 93.
[1500] Ipoh High Court, *Koperasi Kijang Mas & 3 others v Kerajaan Negeri Perak & 2 others*, 1992. In Nicholas, (2010/2).
[1501] Gazetting is the final step in the process of establishing Orang Asli Reserves, it entails the official and public recognition of the designated area.
[1502] Johor High Court, *Adong bin Kuwau & Ors v State Government of Johor, 1997.* In Nicholas, (2010/2).
[1503] Nicholas, (2010/2), p. 8.
[1504] Nicholas, (2010/2), p. 8.

groundbreaking *Sagong Tasi v. Kerajaan Negeri Selangor* cases,[1505] in which the Courts decided that Orang Asli also have a proprietary interest *in* the land.[1506] In *Sagong Tasi*, a number of Orang Asli (Temuan) families from Selangor had a substantial amount of land taken away from them for the construction of a highway. They were informed that they had to vacate their lands within 14 days, and when they failed to do so, they were forcibly evicted during a police operation, which was observed by officials from JHEOA.[1507]

While there was some minor compensation for the crops and dwellings that were destroyed, there was none for the land itself. The Court held that the Temuans have native title under common law over their lands and that compensation had to be given in accordance with the Land Acquisition Act 1960. In the Sagong Tasi cases, the Courts relied on cases from other jurisdictions. Especially the Mabo No. 2 case from Australia and the Calder and Delgamuukw cases from Canada served as examples for the Court of how the native title argument was to be constructed in the case at hand.[1508] But also the old "Nigerian" Privy Council case of Amodu Tijani was cited to explain the communal nature of the title and to explain that simply applying national law does not suffice:

> The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading[1509]

Studying the history and customs of the community was thus deemed invaluable in establishing native title. The Court elaborated that the Temuans do not only have the right over the land but also an interest in the land and that therefore

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1505 Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002 (High Court) and Kerajaan Negeri Selangor & 3 Ors v Sagong Bin Tasi & 6 Ors 2005 (Court of Appeal).

1506 High Court of Selangor, *Sagong Tasi & 6 Ors v Kerajaan Negeri Selangor & 3 Ors*, 2002. In Nicholas, (2010/2).

1507 Bulan (2010), p.182. Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002 (High Court), paragraph 3.

1508 Mabo v Queensland [No 2] (1992) 175 CLR 1 (Mabo No. 2). *Calder v. British Columbia (Attorney General)* [1973] S.C.R. 313, [1973] 4 W.W.R. 1. *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

1509 Privy Council case of *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 AC 399. Cited in Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002 (High Court), paragraph 11.

compensation for those lands should be on the basis of full ownership.[1510] The Court cited Judge Brennan's opinion in Mabo No. 2:

> Whether nor not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of "property' which require alienability under the municipal laws of our society, to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in the people: land is susceptible of ownership, and there are no other owners.[1511]

Furthermore, the Court relied on the Delgamuukw case, quoting Judge Lamer, in dismissing the government statements that Aboriginal title is only a bundle of rights pertaining to certain activities on the land:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. [...] aboriginal title differs from other aboriginal rights in another way. To date, the Court has defined aboriginal rights in terms of activities.
>
> […] in order to be an aboriginal right an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
>
> […] Aboriginal title, however, is a right to the land itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title.[1512]

Recognition of Aboriginal Title is therefore not just recognition of certain aboriginal use rights but concerns a more fundamental right to the land itself. In elaborating on the Mabo No. 2 case, the Court explained that it was the duty of

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[1510] Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002 (High Court), paragraph 11.
[1511] High Court of Australia, Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992). Cited in Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002 (High Court), paragraph 11.
[1512] Supreme Court of Canada, Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, paragraph 140.

the Crown to make sure that traditional title was not destroyed or impaired without the consent of the title holders.[1513]

The Court mentioned the influence and significance of international law, and stated that it was necessary to keep in line with the worldwide recognition now given to Aboriginal rights.[1514] Judge Brennan was cited again:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[1515]

In the Court of Appeal[1516] the decision was upheld and the Court explained that the Temuans indeed have proprietary rights and title over their lands, and that therefore compensation had to be paid for the land itself.[1517] The Federal and State governments had breached their fiduciary duty,[1518] by failing to protect the Orang Asli, to gazette the Orang Asli land and to provide for adequate compensation.[1519] This fiduciary duty is best understood as a duty to protect the welfare of the aborigines including their land rights, not to act in a manner inconsistent with these rights, and to provide remedies where appropriate.[1520]

Judge Gopal Sri Ram also held in Sagong Tasi that the purpose of the Aboriginal Peoples Act 1954 was to protect the first peoples of Malaysia and that: "It was therefore fundamentally a human rights statute, acquiring a quasi-constitutional status giving it preeminence over ordinary legislation. It must therefore receive a broad and liberal interpretation."[1521]

The Court of Appeal, once again relying on Aboriginal Title cases from other jurisdictions, mainly Amodu Tijani, made another important statement:

1513 Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002 (High Court), paragraph 14.
1514 Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002 (High Court), paragraph 11.
1515 High Court of Australia, Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992). Cited in Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002 (High Court), paragraph 11.
1516 Kerajaan Negeri Selangor & 3 Ors v Sagong Bin Tasi & 6 Ors 2005 [CA].
1517 Nicholas, (2010/2), p. 10.
1518 The fiduciary duty arose from Article 8(5)(c) and Ninth Schedule, item 16 of the Federal Constitution. Section 11 and 12 Aboriginal Peoples Act 1954.
1519 Bulan, 2010, p. 183.
1520 Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002 (High Court), paragraph 14.
1521 Kerajaan Negeri Selangor & 3 Ors v Sagong Bin Tasi & 6 Ors 2005 [CA]. par. 20. Also see: Nicholas, (2010/2), p 13.

> […] The fact that the radical title to land is vested in the Sovereign or the State (as in the case here) is not an ipse dixit answer to a claim of customary title. There can be cases where the radical title is burdened by a native or customary title. The precise nature of such a customary title depends on the practices and usages of each individual community.[1522]

Native Title can thus exist together with a formal ownership title held by the government. This statement is highly relevant for the subsequent paragraph, in which the arguments from the parties in the debate surrounding the timber certification scheme MTCS will be examined.

The Sagong Tasi case is a landmark decision for the protection of Orang Asli rights to their traditional lands. The Court confirmed the existence of aboriginal title in Malaysia, which is not merely a right to use certain territories but concerns a more fundamental and proprietary interest in the land itself. As discussed, FPIC is an important tool in guaranteeing and protecting indigenous peoples' rights to land, but there are serious indications that FPIC is often not respected in Malaysia, even while the Malaysian government voted – without any reservations – for the adoption of UNDRIP. Malaysian legislation, policy, and jurisprudence thus seem to a large extent susceptible to indigenous rights, but the reality unfortunately appears to be quite different.[1523] Unawareness of the FPIC requirements in UNDRIP, and of the Declaration in general may be one reason for this, but there are other problems of a more serious nature, that will be discussed next.

Malaysia: the UNDRIP and FPIC

Although the Malaysian government voted for the adoption of UNDRIP,[1524] its commitment to the Declaration is contested by Colin Nicholas in his latest study on the Orang Asli and UNDRIP.[1525] He contended that there is in fact: "An increasing trend not only to go against the intent of the UNDRIP but, more disheartingly, to neutralize or negate the implementation of the UNDRIP principles in the treatment of the Orang Asli in Malaysia."[1526]

While some of the Court cases are in line with the rights enshrined in the UNDRIP, their implementation is prevented by a lack of political will and leadership. In practice, this means that the whole native title argument,

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1522 Kerajaan Negeri Selangor & 3 Ors v Sagong Bin Tasi & 6 Ors 2005 [CA]. par. 12.
1523 This is the main point Colin Nicholas makes in his latest study on the Orang Asli: Nicholas (2010/1).
1524 Noteworthy, Malaysia is also party to the Convention on Biological Diversity. Article 8 (j) of the Convention requires that the traditional knowledge of indigenous peoples and local communities may only be used with their approval:
"Access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices." (CBD 1992).
1525 Nicholas (2010/1), p. 93 ff.
1526 Nicholas (2010/1), p. 95.

reconstructed in *Sagong Tasi,* must be argued anew when Orang Asli file a case over a disputed territory.[1527]

Nicholas identified a number of key problems that prevent the Orang Asli from exercising their rights as indigenous people. The lack of official recognition of the customary laws of the Orang Asli is an important one. While the indigenous peoples of Sabah and Sarawak have their own native court system, such a system is absent for the Orang Asli of Peninsular Malaysia. Moreover, Nicolas claimed that: "The official objective of assimilation and integration into the mainstream society – with the attendant programmes of conversion to Islam and subjection to the mainstream educational curriculum – all attest to the subjugation of Orang Asli identity."[1528]

Issues related to the non-recognition of land, non-recognition as indigenous people, policies of assimilation, and disregard for the customary laws of the Orang Asli all lead Nicholas to conclude that there is a wide gap between the endorsement of UNDRIP by the Malaysian government and its implementation.

The lack of FPIC is another major problem. Nicholas explained that in developments affecting Orang Asli lands, livelihoods or identity, the practice has clearly not been one of obtaining FPIC. Orang Asli frequently find out about planned projects only when they find bulldozers and surveyors already on their territories. In general, Orang Asli representatives are not informed or called to attend meetings and negotiations about their lands. In such decision-making and negotiation processes, the Orang Asli are often misrepresented.[1529] The following paragraph will explore a present-day example of this.

So while FPIC is recognized in UNDRIP and in the Malaysian 1961 Policy Statement (in relation to resettlement), it seems that in practice it is not respected or applied. Nicholas concluded:

> In fact, complying with FPIC requirements is usually regarded as something officials would want to do away with, if they could. And in most cases, they can. Five decades of domination of Orang Asli lives and livelihoods has resulted in JHEOA becoming the 'ruler' of the Orang Asli and with that status, the routinely unchallenged decision-maker for all matters concerning the Orang Asli.[1530]

As was illustrated in part III, a system of fair representation is vital for making FPIC work. Misrepresentation and non-representation of the Orang Asli seem to prevent their effective participation in decision-making. Moreover, as the following paragraph will examine more closely, conflicts regarding the lands and resource rights and the interpretation of FPIC are a major threat to Orang Asli livelihoods and identity.

[1527] Nicholas (2010/1), p. 96.
[1528] Nicholas (2010/1), p. 97.
[1529] Nicholas (2010/1), p. 98-99.
[1530] Nicholas (2010/1), p. 115.

It is clear from the preceding paragraphs that although important steps in legislation, policies ,and cases have been taken towards affirming indigenous rights in Malaysia, practice reveals that implementation is often lacking and that the problems of the Orang Asli in relation to lands, resources, and participation are widespread.

The following paragraph will examine the controversy over FPIC in relation to the Orang Asli and sustainable timber certification schemes in a current case that involves both the Netherlands and Malaysia.

V.2.5.4 Sustainable Logging and the Orang Asli

As was explored at length in the previous paragraphs on the Forest Stewardship Council, protection of the rights of indigenous peoples and local communities is integral part of certification schemes that regulate sustainable forestry and timber sales. In 2010 the Dutch Timber Procurement Assessment Committee (TPAC), which was set up to test and control admission of such schemes for the Dutch market, reversed its earlier judgment and stated that the Malaysian Timber Certification System (MTCS), did not meet the requirements for sustainability. One important objection was that the rights of the Orang Asli were not sufficiently guaranteed. More specifically, requirements in relation to customary rights and free and informed consent were not met by MTCS.

This paragraph will explore this case and the arguments of the parties in relation to FPIC. A short introduction into sustainable forest management was already provided when the Forest Stewardship Council's guidelines on FPIC were discussed. In summary it can be stated that FPIC is the central principle used in the different certification schemes to guarantee firstly that indigenous peoples' rights are not violated and secondly, that they are involved in the process of SFM. And it is precisely this principle that led to controversy and conflict over Orang Asli rights in relation to the Malaysian certification system MTCS.

V.2.5.5 MTCC and TPAC: Concerns about Safeguarding Orang Asli Rights

The Dutch Timber Procurement Assessment Committee (TPAC) assesses if certification systems are in accordance with the Dutch Procurement Policy for timber.[1531] From 2010 onwards the Dutch government has committed itself to 100% sustainable procurement and TPAC is burdened to "test" if these certification systems are in line with the Dutch criteria for sustainable timber. The Committee was set up in 2007 and is one of the five Committees of experts that fall under the independent foundation SMK (Stichting Milieukeur) that assesses environmental certification systems.

[1531] http://www.tpac.smk.nl/nl/s518/c410-TPAC-home. Consulted 12 December 2011.

The most relevant standards of TPAC in relation to indigenous peoples are principles and criteria 1 and 2:[1532]

LEGISLATION AND REGULATION		
Legislation and regulation	P 1. Relevant international, national, and regional/local legislation and regulations shall be respected. To that end the system requires that:	
Requirements of forest manager	C 1.1. The forest manager holds legal use rights to the forest.	
	C 1.2. The forest manager complies with all obligations to pay taxes and royalties.	
	C 1.3. Legal and regulatory obligations that apply to the forest management unit, including international agreements, are fulfilled.	Guidance: International Agreements pertain in particular to the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species (CITES), ILO agreements and the UN Declaration on the Rights of Indigenous Peoples. Irrespective of the fact whether a given country has ratified these agreements, the standard of the Certification system should, where relevant, reflect the intention of these agreements.
Illegal activities	C 1.4. The forest management unit is sufficiently protected against all forms of illegal exploitation, illegal establishment of settlements, illegal land use, illegally initiated fires, and other illegal activities.	
SOCIAL ASPECTS		
Interests of stakeholders	P 2. The interests of directly and indirectly involved stakeholders shall be taken into account. To that end the system requires that:	
Tenure and use rights	C 2.1. The legal status of the management of the forest management unit and claims of the local population, including indigenous peoples,	

[1532] Dutch Timber Procurement Policy, Annex I, User Manual, *for the assessment of certification systems by the Timber Procurement Assessment Committee (TPAC),* Version 4.0 – November 2010.

	in the property/tenure or use rights regarding the forest management unit or a portion thereof have been inventoried and are respected.	
Consultation and permission	C 2.2. Effective communication with and consultation and participation of stakeholders take place regarding the management of the forests.	Guidance: A plan and reports on how and when communication with stakeholders takes place are considered to be indicators of effective communication.
	C 2.3. The local population and indigenous peoples have a say in forest management on the basis of free and informed consent, and hold the right to grant or withhold permission and, if relevant, receive compensation where their property/use rights are at stake	Guidance: Free and informed consent is interpreted in the sense that the activity will not be undertaken before the relevant consent is given. Guidance: The local population and indigenous peoples can only prevent activities through withholding their consent where their property/use rights are at stake.
Public availability	C 2.4. The forest management plan and accompanying maps, relevant monitoring results and information about the forest management measures to be applied are publicly available, except for strictly confidential business information.	Guidance: Public availability implies that if stakeholders should have limited access to certain media, the management plan is dispersed through other channels. Depending on the level of detail in the management plan, the full plan or a summary should be available. Guidance: Wherever practical and necessary, information on the forest management can also be communicated to the people in the forest through *in situ* markings or information displays.
Dispute resolution	C 2.5. Adequate mechanisms are in place for resolving disputes regarding forest management, property/usage rights, work conditions, or social services.	Guidance: In case of a conflict of significant dimension, the FMU will not be certified.
Objects of cultural and economic value	C 2.6. Objects of cultural and traditional economic value are identified and inventoried in consultation with the stakeholders and are respected.	

In the User Manual, free and informed consent is defined as: "The right of indigenous peoples and local communities to give or withhold consent to activities planned on their lands and territories or which will affect their cultures and traditional knowledge. Information on which they should base their decisions should be complete, presented in an understandable manner and be made available timely."[1533] In the Dutch criteria the aim is to integrate current international law in relation to indigenous peoples into its standards. UNDRIP, ILO Convention No. 169, and the CBD are mentioned, and FPIC is the key guiding principle. It is in relation to these criteria that a conflict arose in relation to the Malaysian Timber Certification Council (MTCC).[1534]

On 22 October 2010 TPAC revised its judgment of 3 March 2010, which was initially a positive one, on the Malaysian certificate MTCS after a notice of objection was filed by a number of social and environmental NGOs.[1535] In its revised judgment TPAC concluded that the Malaysian certification system MTCS – which is endorsed by PEFC international – is "not conforming to the Dutch Procurement Criteria."[1536]

Different objections to MTCS were raised, related to its independence from the Malaysian government, the reliability of the certification results, poor public support for the system, and limited NGO and stakeholder participation. However, the most important objections concerned the alleged large scale conversion of forests into palm oil and rubber plantations that occurred and, for our purposes most relevant, the allegations that the rights of the Orang Asli were not sufficiently guaranteed by the Malaysian certification system.

Already in its previous judgment, TPAC had noted that the extent to which the rights of indigenous peoples were recognized and respected in MTCS forests was unclear, and had therefore concluded that its principle 2 "interests of stakeholders" was only partially addressed. The committee had received contradictory information concerning the Orang Asli and MTCS. While the MTCS standard contains a number of stringent criteria related to the rights of the Orang Asli, there was ample evidence that key organizations representing the indigenous peoples of Peninsular Malaysia had dissociated themselves from MTCS and had repeatedly reported rights abuses in MTCS certified forests.[1537]

1533 Dutch Timber Procurement Policy, Annex I, User Manual, *for the assessment of certification systems by the Timber Procurement Assessment Committee (TPAC),* Version 4.0 – November 2010, page 24.

1534 http://www.mtcc.com.my/

1535 '*Response to Notice of Objection*' Response of the Timber Procurement Assessment Committee (TPAC) to the Notice of objection which was filed by Greenpeace et. al. against TPAC's final judgement of the Malaysian Timber Certification System (MTCS), 22 October 2010.

1536 '*Response to Notice of Objection*' Response of the Timber Procurement Assessment Committee (TPAC) to the Notice of objection which was filed by Greenpeace et. al. against TPAC's final judgement of the Malaysian Timber Certification System (MTCS), 22 October 2010, p 12.

1537 '*Response to Notice of Objection*' Response of the Timber Procurement Assessment Committee (TPAC) to the Notice of objection which was filed by Greenpeace et. al. against

The notice of objection filed by the NGOs emphasized the problems regarding the situation of the Orang Asli and their research, together with previously unavailable audit reports led TPAC to conclude that there was a fundamental difference in the interpretation of customary rights between TPAC and MTCS. These interpretations, which will be examined in the next paragraph, eventually led the Committee to conclude that principle 2 was inadequately addressed.

A large number of reports, statements, letters, and hearings followed the revised judgment of the Committee,[1538] leading up to an appeal against the judgment by MTCC.[1539] The precise meaning of the difference in interpretation about the use rights and FPIC – and the profound consequences this may have on the Orang Asli situation – is best explained taking into account the decision in the appeal case. First some of the problems the Orang Asli experience with the MTCS certificate will be mentioned to get a clear picture of the substantive issues involved.

V.2.5.6 FPIC in the MTCS case: Standards versus Reality

A number of serious allegations have been made against MTCC by Orang Asli representatives and societal organizations. As was mentioned earlier, virtually all problems are a result of the non-recognition of Orang Asli territories. Recall that only 15% of the total area that is claimed has been formally gazetted as Orang Asli reserves in accordance with the Aboriginal Peoples Act.

A 2010 field study by Grassroots Consulting clearly exposed the problems the Orang Asli have with MTCS logging activities. While the study was conducted in two Orang Asli villages, its results reflect problems that persist for the larger part of Orang Asli forest communities.[1540] The findings indicate that there has been virtually no stakeholder consultation and that no fair compensation was offered for the loss of land. Orang Asli were refused access to parts of their ancestral lands and extensive logging led to a serious loss of means of subsistence. Moreover, ancestral graves and sacred sites were destroyed by the logging operations and there were even casualties among the Orang Asli caused by landslides as a result of the logging operations.[1541]

TPAC's final judgement of the Malaysian Timber Certification System (MTCS), 22 October 2010, p. 8.

[1538] For the full dossier, see: http://www.indigenouspeoples.nl/our-issues/timber/228-more-info. Consulted 14 December 2013.

[1539] Brought before the Board of Appeal of SMK (Stichting Milieukeur), the umbrella organisation in which TPAC is embedded.

[1540] *Cf. The views and experience of indigenous communities with the Malaysian Timber Certification Scheme (MTCS)*, Grassroots Consulting, 2010.
http://www.indigenouspeoples.nl/images/stories/pdf/Timber/2010-04-09_bijlage_2_TPAC-MTCS_social_issue_report.pdf

[1541] *An Unfair Burden, A rapid field assessment on logging impacts of MTCC-certified operations in and around the Orang Asli villages of Pos Jernang and Pos Gedung, Perak*. Grassroots Consulting, 2010.
http://www.indigenouspeoples.nl/images/stories/pdf/Timber/Response_of_Applicants_to_first_round_of_Questions_of_TPAC._Annex_to_response_2._An_Unfair_Burden.pdf

FPIC processes that are required by the Dutch TPAC criteria, and that also form the core of the social criteria in the FSC and PEFC standards, have clearly not been applied here. But also within the MTCS system, FPIC is a requirement. The Malaysian Criteria and Indicators for Forest Management Certification (or in short the MC&I(2002)) was the standard used for assessing forest management practices at the forest management unit (FMU) level for the purpose of certification.[1542] Identical to the old FSC principles, it is stated in the MC&I(2002) that: "Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies."[1543]

The question arises as to why – if MTCS recognized FPIC as a requirement – the principle was not adequately applied. The arguments of the parties and the decision in the SMK Board of Appeal case will answer this question and clearly illustrate how FPIC criteria can easily be brushed aside. Two related issues are at stake here: firstly, the rights that the Orang Asli have to use their lands (customary rights) and secondly, and closely related, the right to have a say in forest management: FPIC. The crucial consideration, which led TPAC to revise its judgment on the Orang Asli situation was stated as follows in the response to the notice of objection:

> The Committee concludes that there is a fundamental difference in interpretation of customary rights between the Committee on the one hand and MTCS certified forest managers and certification bodies on the other. The Committee interprets customary rights as resulting from and/or based on traditional use. The forest managers and certification bodies limit the customary rights primarily to formal rights that have been granted to indigenous communities by the state. This difference in interpretation implies that rights resulting from and/or based on traditional use are not recognized in MTCS certified forests, and are therefore not at all times respected. This has led the Committee to conclude that Principle 2 (Interests of Stakeholders) of the Dutch Procurement Criteria is inadequately addressed by the MTCS.[1544]

1542 Malaysian Criteria and Indicators for Forest Management Certification, [MC&I(2002)]. Presently, the MC&I(2002) have been replaced on 13 January 2012 by the new MC&I (Natural Forest), which entered into force on 1 July 2012 and is mandatory to be used for the certification of natural forests with MTCS certification as of 1 January 2013.

1543 Malaysian Criteria and Indicators for Forest Management Certification, [MC&I(2002)], p. 12.

1544 '*Response to Notice of Objection*' Response of the Timber Procurement Assessment Committee (TPAC) to the Notice of objection which was filed by Greenpeace et. al. against TPAC's final judgement of the Malaysian Timber Certification System (MTCS), 22 October 2010, p. 11.

The main problem is not that MTCS does not recognize indigenous peoples' rights but that the interpretation given to them is excessively restrictive. Only where formal ownership rights have been established, are the Orang Asli protected under the MTCS scheme. As was explained, only a small part of the land claims have been formally granted. This means that in practice, customary rights and rights to have a say in the forest management are not recognized in MTCS certified forests when no formal gazetting has been concluded in these areas.

Nevertheless, as was decided in *Koperasi Kijang Mas,* formal gazettement is no necessary requirement for the existence of customary rights. Furthermore, the *Adong* case asserted the existence of rights to use the land for subsistence and other needs; the right to live on their land as their forefathers had lived.

Moreover, the international framework set out by the UNDRIP clearly does not require formal ownership rights to be in place for indigenous communities to have rights to use their lands. On the contrary, in the UNDRIP states are required to give legal recognition to traditional lands *over which they already have - traditional or customary - rights*. Recall Article 26:

> Article 26
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[1545]

The argument by MTCC that these rights do not exist where the state has not formally granted ownership rights clearly does not hold. In its statement before the Board of Appeal, TPAC further explained this problem in relation to FPIC:

> TPAC's criterion 2.3 concerning the right of indigenous peoples to have a say in forest management on the basis of free and informed consent, is also touched upon by several MTCS criteria. On paper,

[1545] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), A/RES/61/295, adopted by the General Assembly on Thursday September 13 2007. Article 26.

> the MTCS standard seems to be quite robust on this topic. However, TPAC learned that MTCC makes this rights conditional on legal ownership of the relevant areas. Because the Orang Asli are not the legal owners of the forest they traditionally use, MTCC in fact invalidates the relevant MTCS criteria.[1546]

MTCC claimed that the issue of free and informed consent did not arise because the areas used were already excluded from the certified forests through the gazettement process. This argument clearly does not hold, in light of what was stated above and since only a small part of the claims has been formally granted. Moreover, we learned from *Sagong Tasi* that aboriginal title – a proprietary interest in the land itself – can exist alongside formal property rights held – in this case – by the state. Instead, the argumentation of TPAC appears to be accurate. The Committee stressed that regardless of whether the Orang Asli exclusively and formally own the forest, they should still have a say in forest management on the basis of FPIC. Before the Board of Appeal, TPAC explained that the right to have a say in forest management is recognized in international law as a key right to free, prior and informed consent.[1547] According to the Committee: "Although the interpretation of this right may differ in international documents,[1548] none of these documents makes this rights conditional upon legal ownership of the area in question."[1549]

In the decision of the Board of Appeal of SMK, the viewpoints of TPAC were upheld, and the appeal lodged by MTCC was dismissed.[1550] Nevertheless, the standpoints taken by MTCC show how easy it is to brush aside FPIC requirements and indigenous rights. The reasoning by MTCC is not only legally incorrect, it also misses the point. There is always a duty to consult indigenous peoples when their lands and livelihoods are at stake,[1551] and FPIC is the guiding principle for such negotiation processes. Even when dealing with an internationally recognized scheme for sustainable development, which entails state

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[1546] SMK Board of Appeal, Utrecht, Session of 5 August 2011, MTCC/TPAC. TPAC Statement for the Hearing of the SMK Board of Appeal, p. 3.

[1547] SMK Board of Appeal, Utrecht, Session of 5 August 2011, MTCC/TPAC. TPAC Statement for the Hearing of the SMK Board of Appeal, p. 4.

[1548] TPAC mentioned the international legal framework and indicated that FPIC is predominantly present within the 2007 U.N. Declaration on the Rights of Indigenous Peoples and the concept has been referred to by the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights. Moreover, consent requirements are present in documentation of the International Labour Organisation, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, The Committee on Economic, Social and Cultural Rights, and in the framework of the World Bank Group.

[1549] This is also the position taken in a legal opinion to TPAC from Tilburg University, available upon request.

[1550] Binding Opinion, Board of Appeal of Stichting Milieukeur (SMK) of the Hague, 19 October 2011.

[1551] *Cf.* IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 133.

of the art international law regarding indigenous peoples, practice seems far removed from the requirements and standards in place.[1552]

V.2.5.7 Conclusions and Lessons from the "Orang Asli Case"

This paragraph illustrated the difficulties that arise in implementing FPIC by means of exploring the situation of the Orang Asli of Peninsular Malaysia and sustainable forestry schemes. What is troublesome is that even within voluntary schemes for sustainable forest management, which include the highest internationally recognized standards for indigenous peoples protection, FPIC is misunderstood and disregarded.[1553] A large number of the issues that are dealt with in this study are also present in this case.

Although national judicial decisions, policy instruments and legislation exist, and international commitments have been made, the Orang Asli still face enormous problems in having their rights recognized in practice. There is no clear agreement on and recognition of Orang Asli rights to their lands and resources.

More fundamentally, policies of cultural assimilation and non-recognition of the Orang Asli as a people undermine their right to self-determination. In line with what was argued in Part II of this study, FPIC remains a difficult requirement to implement as long as these underlying rights are contested and disputed. On the other hand, FPIC is also the principle by which agreement on these indigenous rights is to be established. The lack of political will to fully implement the Aboriginal Peoples Act and to formally gazette the Orang Asli reserves is troubling. Nevertheless, SUHAKAM (the Malaysian Human Rights Commission)

[1552] The political process about whether the Dutch government will accept MTCS for the Dutch market is still underway at the time of writing (April 2014), but with the negative advice from both TPAC and the Board of Appeal of SMK, it seems likely that MTCS will – only – be accepted when MTCC undertakes a number of measures that will improve the current situation. In this respect, also see: Greenpeace, WWF, NCIV, *"Did MTCC Implement the Netherlands Malaysia agreement dated 17 November 2010?"*, 11 July 2013. The report indicates that up till now, MTCC has not complied with the requirements that TPAC had set. Furthermore, the report compares the old MTCS standard MC&I (2002) with the new standard MC&I (Natural Forest) and concludes that MTCS continues to uphold an outdated definition of FPIC. The new standard does refer to the UNDRIP and adds 'prior' to the requirements of FPIC. Nevertheless, the standard still only requires FPIC when customary rights have been 'duly recognized' (indicator 2.2.2). This remains controversial, since formal rights that have been granted to the Orang Asli (Gazetted Reserves) by definition do not coincide with MTCS certified forests.

[1553] Noteworthy, only 1 – 2 % of the Malaysian forests are under a sustainable certification scheme. The situation for the indigenous population in the rest of Malaysian forests is sometimes equally bad, but often even worse than in MTCS certified areas. A well known example of this is the situation of the (hunter gatherer) Penan People in Sarawak, Malaysian Borneo, the Penan are one of the few remaining nomadic peoples of the rainforest. Their survival is severely jeopardized by illegal logging. Nevertheless, the integration of international law pertaining to indigenous peoples in timber certification schemes is a positive development, one that may strengthen their legitimacy and lead to *e.g.* best-practices on how to implement UNDRIP's rights and principles.

is in the process of conducting a National Enquiry on land rights which includes extensive consultation processes.[1554] It is too early for conclusions, but its results may be beneficial for the Orang Asli in creating awareness about UNDRIP and the situation of the Orang Asli for the majority population, but also in informing the Orang Asli themselves about the rights they can claim. It is these sorts of dialogues that may lead to real results.

The key problem for the Orang Asli is that no effective participation or FPIC is possible as long as they are not fairly represented.[1555] There are numerous reports of misrepresentation (by governmental institutions), manufactured consent (for instance having government officials appointing headman), coercion, and bribery.[1556] This is clearly in conflict with the *"free"* requirement.

The requirement that the Orang Asli should have sufficient time before reaching an informed decision was clearly violated in the *Sagong Tasi* case, where a community was asked to vacate their traditional lands within two weeks time. This is a clear violation of the *"prior"* requirement. Similar issues arose in relation to MTCC and the Orang Asli.

Looking more specifically to the "MTCS case" it is evident that the lack of consultation, information, and communication about MTCS activities on Orang Asli lands do not satisfy the *"informed"* criterion. Most Orang Asli communities do not know which parts of the forest is MTCS certified and are unaware of the place, scale, and duration of the logging activities.[1557]

[1554] See: http://www.suhakam.org.my/web/682315/1. "This year, for the first time since its inception in 1999, SUHAKAM is holding a national inquiry on the issue of customary land ownership rights of the Orang Asli in Peninsula Malaysia and of the indigenous peoples in Sabah and Sarawak. It has decided to conduct the national inquiry following numerous complaints and memorandums received over the years on alleged infringement of the rights of the indigenous peoples on their customary lands. The National Inquiry was officially launched at SUHAKAM's office in Kuala Lumpur on 10th May 2011. Experts on native customary land ownership rights including those with the legal background as well as the academicis have been invited to assist the inquiry to achieve its objectives. Also to be discussed during the inquiry are issues relating to occupational exploitation and education of the Orang Asli and other indigenous groups in the country. Another important function of the inquiry is to create greater public awareness and to raise issues that many may previously have not been aware of especially those in relation to violations which are not obvious to the public and which may not have been brought up before." Consulted 14 December 2011.

[1555] The necessity of a fair system of representation, and the problems that may occur in relation to representation have been dealt with earlier in this study.

[1556] These issues of unfair representation are recognized as the key problem by Dr. Ramy Bulan, from the Centre for Indigenous Studies, University of Malaya, a leading expert on indigenous rights in Malaysia, and have been corroborated by Lim Teckwyn of the Malaysian Nature Society and former (and first) manager of MTCC, and Colin Nicholas, Coordinator van Centre for Orang Asli Concerns (COAC).

[1557] Dr. Colin Nicholas' opinion is that FPIC is never relevant in Malaysia, since the Malaysian common law system does not perceive FPIC requirements as law. According to Nicholas, international law is not taken into account in Malaysia. Moreover, where Orang Asli are consulted, their opinions are often ignored or explained differently. Mister Lim Teck Wyn, a forestry expert and former employee of MTCC, explained that the Orang Asli are often misrepresented, and that their situation is getting worse. According to Teck Wyn,

The statement by MTCC that: "since no formal ownership rights are in place in MTCS certified forests, the issue of FPIC does not arise" painfully exposes the misconceptions about FPIC. It is not just when legal property rights are in place that FPIC is relevant. On the contrary, FPIC is always the relevant guiding principle in decision-making processes between indigenous peoples and the state.[1558] If MTCC's argumentation would be upheld, the Orang Asli would have no rights at all in MTCS certified areas. FPIC is not a veto-right but a principle that "spells out" under which conditions and with which objective fair negotiating processes are to take place. The requirement of *"consent"* as a process, by truly representative institutions and in accordance with indigenous decision-making processes. has clearly not been met here.

The MTCS case again demonstrates clearly that the conflicts regarding the interpretation and application of FPIC arise from its underlying notions, but as has been shown, there is no reason to assume that land that formally belongs to the state cannot be burdened with a native title at the same time; *overlapping rights* do not invalidate FPIC requirements.

The *social isolation* of the Orang Asli leads to unawareness about their rights and makes these rights vulnerable to misrepresentation. Instead of declaring FPIC requirements "not applicable" it is especially in these situations that the guidelines that FPIC proposes are to be upheld, if fair decision-making, conflict resolution, and sustainable partnerships are to be achieved.[1559]

V.2.6 Conclusion: Progressive Implementation of FPIC in Voluntary Schemes

This paragraph discussed some of the most progressive implementation models for FPIC processes included in voluntary initiatives concerning sustainable commodity use. At the beginning of this study, the legal foundations of FPIC – self-determination and corollary rights to lands and resources – were exposed. FPIC is gaining ground in international documents and platforms as one of the most important principles for protecting indigenous peoples livelihoods and to integrate indigenous communities as fairly as possible into decision-making processes that concern them.

The OAS legal model provides the most comprehensive legal system for protection of indigenous peoples' rights to lands and resources. FPIC cannot be detached from a stable system of such rights: without these rights, FPIC becomes meaningless. And as was indicated, this also works the other way around: without

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'effective participation' of indigenous peoples in Malaysia is a myth and national policies are still aimed at assimilating Orang Asli and other indigenous peoples in Malaysia. One of the main problems is that the Orang Asli are not aware of their rights and there are virtually no programmes that promote awareness about these in the communities.

[1558] MTCC's independence from the Malaysian government is often questioned.

[1559] Unfortunately, up till now, not much progress has been made to strengthen and improve the FPIC processes in MTCS certified forests, see: Greenpeace, WWF, NCIV, *"Did MTCC Implement the Netherlands Malaysia agreement dated 17 November 2010?"*, 11 July 2013.

FPIC, rights to lands and resources, and truly self-determined development, is impossible.

The legal model exposed provides justifications for granting indigenous peoples rights to consultation and consent but it offers limited guidance on its implementation. As we have seen, not much detailed studies on the implementation of FPIC exist. The most elaborate models on how to implement FPIC processes can be found in systems that were defined as "voluntary initiatives." This paragraph has reviewed and examined the most recent and relevant of these initiatives in order to come to terms with which elements are most important when FPIC is being operationalized.

The Akwé: Kon Guidelines are one of the most important directives for integrating social, cultural, and environmental impact assessments. As was discussed, the scope of FPIC necessarily depends on the impact the decision will have on the indigenous communities affected. These impact assessments are also required by international law, most prominently in the "Saramaka model" the Inter-American Court developed.[1560] The CBD guidelines may be of assistance in fulfilling the "informed" requirement of FPIC. Without proper – and participatory – assessments of the impact a certain project or decision may have on the culture, social structure, and environment of indigenous peoples and other involved actors, it is impossible to make a genuinely informed decision. FPIC entails the inclusion of indigenous decision making structures in broader decision making processes. The essence of a successful FPIC process is that it is largely designed by the community. These ideas are reflected in the Akwé: Kon Guidelines.

The implementation models that were explored in the framework of the FSC and the UN-REDD Programme offer the most comprehensive and detailed systems for implementing FPIC currently available. Although both these schemes focus on the implementation of FPIC in relation to specific projects, they do offer general guidance that may be taken into account in a variety of FPIC processes.[1561] In both schemes this is acknowledged and the aim is to bring their guidelines in tune with international law. Warnings against overly determined models for FPIC were given throughout this study, but the examined schemes all focus on a participatory, community developed FPIC protocols. This way, a self-determination based process is promoted. Some critical remarks will be given later on, but in trying to distill the most important elements from the FSC, REDD and CBD guidelines, the following points appear necessary for successful FPIC processes:

[1560] Also see UNDRIP, Article 32(3) on development projects that affect indigenous peoples lands: "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."

[1561] It was already suggested that the FSC and UN-REDD Programme guidelines may serve to inform the other sustainability initiatives explored in this paragraph: the 'Roundtables' and the ICMM.

- Identification of indigenous communities and other stakeholders that may be affected by a certain project.

- Identification of the (customary) rights and representative institutions of the involved indigenous peoples.

- Participatory mapping of the lands, territories, and resources of the indigenous peoples involved, including sacred sites.

- Conducting impact assessments, using a participatory approach: social, cultural, and environmental impact assessments need to be integrated.

- Agreement on community developed FPIC protocols, taking into account traditional decision-making structures.

- Provision of sufficient time and resources to conduct the decision making process. Awareness raising about the planned activity and capacity building in communities to enter into negotiations, both internally and in relation to other actors.

- Sufficient information and consultation rounds: it is essential that all communities and groups within communities are informed and consulted in a way that is culturally appropriate and understandable.

- Producing consent agreements: these may have many forms and may entail compensation provisions, benefit sharing schemes, scope, duration and targets of the projects, relevant rights, and policies.

- Creating effective review and grievance mechanisms: FPIC is an iterative process and a principle that has to work both prior and post the decision-making moment(s).

- These elements all have to respect and promote contemporary international law, mainly the UNDRIP, ILO Convention 169, and the CBD.

This list is by no means exhaustive but offers a general and flexible "baseline" for conducting FPIC processes in a variety of settings. Moreover, some of the elements may be left out if the process does not reach the stage in which they become relevant; for instance when a community decides in a very early stage that further cooperation is not desirable.

In the general conclusions to this study, the reflections on the different parts of this study will be combined in order to come to a coherent explanation of FPIC. The remainder of this paragraph is concerned with some final remarks on the voluntary schemes examined, taking into account the case study on the Orang Asli and some further complications that may arise when FPIC processes are being implemented.

The other initiatives that were examined – RSPO, RSB, RTRS, and ICMM – all enshrine FPIC as an important criterion for sustainable activities. Nevertheless, implementation of these requirements is underdeveloped and needs further research. It is recommended to take into account current international law as well as the FSC and UN-REDD programme work on implementing FPIC.

Unfortunately, not many actual case studies on the implementation of FPIC processes in the framework of the FSC and UN-REDD Programme currently exist. It is too early to make definite comments about the effectiveness of the FSC and UN-REDD Programme models. Different best practice or case studies are being developed, and will undoubtedly lead to useful insights. Voluntary initiatives may go beyond what is strictly speaking legally required but also adhere to the international legal standard-setting on FPIC.[1562] The proposed implementation models focus on continuous dialogue with indigenous communities and entail strong information and communication requirements before and after formalizing an FPIC agreement about projects dealing with sustainable commodity use.

Practical implementation remains extremely difficult, as the Orang Asli case illustrates. It reveals complications when implementing the FPIC requirements in a scheme concerning sustainable forest management. Since Malaysian legislation does not recognize the largest part of Orang Asli claims to traditional lands, all these lands remain formally owned by the State. Customary rights to land have been recognized by the Malaysian Courts, although only to a minor extent. When formal ownership rights overlap with customary rights of indigenous peoples, their legal protection is minimal. In the Orang Asli case further complications arose. Although MTCS requires FPIC in their principles and criteria, in practice the requirement is meaningless, since MTCS only recognized a right to FPIC in forest reserves that were formally gazetted. Since no parts of the MTCS certified forests overlapped with formally gazetted reserves, the Orang Asli had no say over forest management whatsoever. So, besides non-recognition of Orang Asli rights over lands in national legislation, FPIC was rendered meaningless since the certification body itself employed a definition of FPIC that made it impossible for the Orang Asli to invoke their right.

More fundamentally, policies of cultural assimilation and non-recognition of the Orang Asli as a people undermine their right to self-determination. In line with what was argued in Part II of this study, FPIC remains a difficult requirement to implement as long as these underlying rights are contested and disputed. On the other hand, FPIC is also the principle by which agreement on these indigenous rights is to be established.

[1562] Which is often more than can be said about national legislation in this respect.

The key problem for the Orang Asli is that no effective participation or FPIC is possible as long as they are not fairly represented. As long as national laws have no eye for international legal and voluntary explanations of FPIC, its effective implementation is impossible.
These complications seriously jeopardize effective implementation of FPIC, even when voluntary sustainability initiatives are in place. Nevertheless, the case has led to increased attention for Orang Asli rights in relation to the international legal requirements that have emerged over the last few years.[1563]

The Orang Asli case illustrated how different and conflicting interpretations of FPIC lead to vast problems in relation to its implementation. Furthermore, the MTCS case proved another important point in this study: that without a clarification and recognition of the underlying norms of FPIC – self-determination, land and resource rights – implementation of FPIC is highly problematic.

Final Observations

Integration of international law and sustainability initiatives leads to increased legitimacy of such "voluntary" schemes. Furthermore, these initiatives themselves may inform international organizations dealing with indigenous rights on the practical implementation of FPIC requirements. They lead to a growing awareness among companies, indigenous peoples, and government organizations of consultation and consent requirements based on rights to self-determination, lands, and resources. This may lead to a growing commitment to international legal standards concerning indigenous peoples, and to FPIC in particular. However, some of the initiatives examined differ substantially in how they interpret and aim to implement FPIC. A more streamlined model, in which the different initiatives cooperate and are compared, is needed in order to come to a common understanding of how to implement FPIC. The elements identified above may serve as a proper starting point.

As long as no policy and legal reforms accompany the implementation of these voluntary initiatives, implementation of FPIC remains highly problematic, as the Orang Asli case illustrated.[1564] More cooperation and harmonization of FPIC requirements in the initiatives – in tune with international law – may promote such legal reform.

These models nonetheless remain difficult to implement. They will cost a lot of time and resources, and place a lot of responsibility in the hands of the indigenous communities, who may not yet have the capacity to engage in negotiations. It is important to secure that indigenous peoples have a sufficient

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[1563] Recall that the Malaysian human rights commission, SUHAKAM, is preparing a detailed study on land rights and indigenous communities. SUHAKAM is also involved in a awareness raising campaign which includes promotion of the UNDRIP.
[1564] Also see: Colchester M, Chao S, Jiwan N, 'Securing rights trough commodity roundtables? A comparative review', Pre-Conference draft, Forest Peoples Programme, 2012, p. 23.

level of discursive control in these settings in order for a successful intercultural dialogue to take place. Moreover, companies may not be inclined to adhere to voluntary schemes if the cost is too high.

It is imperative to avoid a "check-list" approach to FPIC.[1565] Instead we should advocate a participatory approach in which the development of the process itself becomes a tailor-made exercise of self-determination. Only when these implementation models themselves are the result of a participatory process, can they respect the FPIC principle.

To finish on a more positive note, implementation of FPIC is also made possible by means of employing these voluntary initiatives, even when no national legislation is in place. These voluntary schemes are backed-up by international law; the Akwé: Kon, FSC, and UN-REDD Programme Guidelines are all based on current international legal arrangements. In that sense, they may not be so voluntary after all.

Remarkably few best practice or case studies on the implementation of FPIC in these schemes are available as of yet. Fortunately, both the FSC and UN-REDD Programme are developing pilot-studies. These will help to implement FPIC in the future if they are well documented and analyzed in a comparative way.

Sustainable development and environmental protection has to go hand in hand with protecting indigenous peoples. In these paragraphs it was argued that the voluntary track is extremely important for exposing how FPIC processes are to be implemented since these initiatives are on the rise and are often more easily accepted and more widely supported – in practice – than international rules dealing specifically with indigenous peoples. Furthermore, in some cases they already entail the mechanisms, procedures, and guidelines necessary for implementing FPIC. Moreover, these systems often already contain rules for the allocation of resources for capacity building in indigenous communities, and the bodies that will have to be involved in conducting the FPIC processes are often indicated. These schemes provide a testing ground for assessing the chances and pitfalls that FPIC processes entail – in specific settings – and will provide important data if comparative case studies are developed.

Protection of biodiversity and cultural diversity is integrated in these schemes and they follow current international (case) law by advocating a holistic approach to tackle environmental, social and cultural issues. Such an integrated approach may enforce and back-up indigenous rights. Moreover, indigenous peoples' traditional knowledge may help to secure a more sustainable management of the environment.

[1565] This was also discussed at length in the paragraph on information and communication.

VI. CONCLUSIONS

VI.1 Explaining FPIC

Indigenous peoples worldwide are often affected considerably by different types of development projects taking place on or near their traditional lands and territories. One of the effects of a globalizing economy is that the earth's remaining natural resources are extracted at an increased pace by states and large transnational corporations. Areas in which these resources are found are often occupied by indigenous communities, but frequently their rights to these lands are not recognized and the communities are not having a say in the relevant decision-making processes, even though these processes may have an enormous impact on them.

In international human rights law this problem is recognized and during the last decades a number of legal instruments have been developed to counter the existing power imbalances. Nevertheless, genuine implementation of the developed standards is urgently needed, otherwise the codification of indigenous rights remains merely a reminder of the injustices and human rights violations that indigenous people(s) have faced and continue to face present day. Fortunately but slowly, implementation models and procedures are being developed in the context of different international and regional organizations and on the national level.

Free, prior and informed consent is seen as an important tool to realize recognition and application of indigenous rights. The purpose of FPIC is to give indigenous communities a stronger voice in the mentioned processes and it is rapidly becoming one of the most important concepts in contemporary international law concerning indigenous peoples. However, it is also one of the most contested and debated ideas in the context of the UNDRIP and beyond.

This study examined the following central questions: How is the concept of "free, prior and informed consent" presently understood in the context of indigenous peoples' rights - under international law - to self-determination, land, resources, and participation and under which conditions could its implementation succeed in practice? The following paragraphs will explain in detail how these questions were answered throughout this study. At the end of this concluding part those findings will be summarized.

For a proper examination of FPIC it has to be seen together with the substantive rights it is primarily concerned with. These are mainly: the right to self-determination, the right to effective participation, and rights to lands and resources. Like FPIC, these rights are amongst the most contested and debated current legal standards, since fully recognizing them may have profound redistributive consequences. It was argued that FPIC is not just a simple procedural requirement, but that it denotes a complex process that serves to promote respect for vital rights for indigenous peoples, mainly the right to self-

determination and rights over lands and natural resources. This study has explored and analyzed this process from a number of legally relevant perspectives.

As a starting point, the normative premises in international law on which FPIC is founded, were examined. Subsequently, the procedural framework surrounding FPIC and its different elements were inspected. The international diffusion of FPIC norms was charted and in the fifth part of this study the current legal standing of FPIC was discussed in light of recent case law, mainly in the context of the OAS Human Rights System. Finally, a number of recent voluntary implementation models for FPIC were considered in order to suggest practical guidelines for its application.

Although FPIC is still developing and a number of questions about its application remain unanswered, it is becoming one of the most important and practical tools to operationalize indigenous peoples' right to self-determination in concrete situations and will become an important site for resolving tensions between indigenous peoples and other actors in complex decision-making processes that may have profound economic, social, and cultural implications.

VI.1.1 Principles: Self-Determination and Rights to Lands and Resources

The Legal Infrastructure of FPIC

In order to understand the scope and content of FPIC processes it is vital to consider their normative premises, namely rights to self-determination, lands, and resources. FPIC derives its legitimacy from these norms, and the manner in which it should be applied depends on the nature of the affected rights and the impact the relevant decisions may have on those rights.

The principles or foundations of FPIC are important to consider since consent is always "parasitic" upon another standard or value; you give your consent because otherwise a certain – higher or substantive - standard would be violated.

A right to self-determination is the core claim indigenous peoples make. However, for indigenous peoples self-determination usually does not involve independent statehood, but has to be achieved within the framework of the state in which the indigenous communities reside. Therefore, indigenous self-determination is not just about autonomy, but it is also concerned with effective participation in the larger society. Indigenous peoples have no choice but to be affiliated with the state and it is essential to make sure that this relationship is organized in a fair way. Such participation is particularly important when indigenous lands and resources are at stake. This perspective on self-determination has both internal and external connotations. Internally, it is concerned with fair participation and representation of members of the indigenous community in decision-making, and externally it is related to the way in which an indigenous collective participates in decision-making processes in relation to other actors.

Accordingly, self-determination for indigenous peoples is mainly a relational or participatory right that has important economic, cultural, and political characteristics. Most importantly, and central to this study, self-determination especially requires indigenous *control* over their lands and resources. Indigenous

peoples not only require protection of their lands and resources for their subsistence, but also have a special spiritual and cultural attachment to their lands. Their lands generally form a part of their cultural identity and may be in need of special protection. For indigenous communities, their territories are not simply a commodity they can sell and acquire at will, but a part of who they are. Not recognizing rights to lands therefore not only leads to economic problems, but to identity based issues as well.[1566]

These substantive rights to lands and resources have to be accompanied by participatory norms in order for them to become effective. Participatory mechanisms serve as the conduit between the substantive international legal norms and their implementation in fact; they are the tools to close the existing implementation gap and it is therefore understandable that a lot of effort is directed towards making these participatory tools effective. It is only in a dialogue in which indigenous peoples are fairly represented that the scope of these rights can be determined. That is why the right to effective participation and FPIC are perceived as such important tools or mechanisms for operationalizing indigenous peoples' right to self-determination.

VI.1.2 Procedures: Effective Participation and Free, Prior and Informed Consent

Effective Participation

In order to give indigenous peoples more control over their lands and resources, to allow them to be "self-determinating" in that respect, different participatory provisions are enshrined in the UNDRIP, ILO Convention No. 169, and a number of other instruments, cases, and reports.

Within the framework of the UN, the right to effective participation is seen as a general framework for all dealings with indigenous peoples. Recently, different studies have concluded that without a right to effective participation both the individual and collective human rights of indigenous peoples cannot be fully enjoyed. This right includes a corollary duty of states to consult with indigenous peoples, and where necessary obtain their free, prior and informed consent. Effective participation, however, remains an ambiguous concept. FPIC takes a central place in discussions about the application of the right to effective participation and helps to clarify its content since it could denote a more practical, realistic, and targeted approach when it comes to including indigenous peoples in decision-making processes.

The lack of indigenous peoples' participation, consultation, and consent in all sorts of matters that affect them remains one of the most pressing contemporary issues.

[1566] *Cf.* Taylor C, 'The Politics of Recognition' in Amy Gutmann, *Multiculturalism, Examining the Politics of Recognition* (Princeton University Press, Princeton, 1995).

Intercultural Dialogues guided by Recognition, Continuity, and Consent

James Tully's influential study "Strange Multiplicity" was examined to come to terms with the justifications and content of effective participation for indigenous peoples. His viewpoints are important since indigenous peoples frame their claims in the language of international law and more specifically in the language of human rights and rights to democratic governance; the essence of self-determination. Tully distilled three important principles from constitutional practice that serve as preconditions for a fair intercultural dialogue in multi-nation states.

Indigenous peoples' struggles are struggles for recognition of their collective identity and their collective rights to self-determination, lands, resources, and participation. The central question is: What kind of constitutional or legal viewpoints can accommodate such culture-differentiated rights on the national level?

It was argued that these outcries for recognition are essentially struggles for liberty, involving claims to self-rule and non-domination. These demands for cultural recognition call for a variety of forms of self-rule and require an effective intercultural dialogue on different levels. Tully examined the foundations for such an intercultural dialogue, in which similarities and differences between indigenous groups and others can be mapped in order to get to a common understanding about appropriate forms of self-rule. He convincingly argued that when intercultural negotiations are held in accordance with the principles of *mutual recognition*, *continuity,* and *consent*, they will be respectful of cultural differences. Tully's most important argument is that when indigenous peoples claim injustice has been done and demand redress, they appeal to these three conventions to justify their case, arguing that their status as nations or peoples has been *misrecognised* and their powers of self-rule *discontinued* and their *consent* bypassed.

This framework for intercultural dialogue is directly applicable to FPIC and self-determination processes. Moreover, it corresponds with the legal model for implementing land, resource, and participation rights that was examined in Part V of this study. *Recognition* as people and as legal subject is essential for an effective regime of collective rights to lands, resources, and participation. The dialogue has to be a *continuous* one, since indigenous peoples' right to self-determination is primarily exercised within the framework of the state and therefore parties are bound to live together in that setting. Moreover, the spirit of the UNDRIP is one of cooperation and respectful lasting relations between indigenous peoples and states. Self-determination and FPIC processes also have to include a continuous dialogue at the project level. A principle of *consent* should be at the basis of new arrangements or alteration of existing agreements. Moreover, consent always has to be an important goal of consultation processes.

A vital insight from Tully's study is that that the arguably outdated conception of cultures as separate, bounded, and internally uniform should be replaced by a

view of cultures as (a) overlapping, (b) interactive, and (c) internally negotiated.[1567] Cultures do not only overlap geographically and come in a variety of types; they are also densely interdependent in their formation and identity, and exist in complex historical processes of interaction with other cultures.[1568] Moreover, they are not internally homogenous but continuously contested, imagined, and negotiated, both by their members and through interaction with others. For a good understanding of the nature of FPIC processes, this is an invaluable perspective, since FPIC processes take place in dynamic settings of overlapping and interdependent identities and allegiances; especially in cases in which large-scale development projects trigger rapid change in indigenous societies.

The proposed model for effective participation is an open dialogue, in which there should be room for review and renegotiation if the solution is not as fitting as it appeared at the time. Tully advocated a practical dialogue in which similarities and differences are mapped, recognized, and respected. Moreover, he argued that this dialogue should be reiterative and decisions made open to revision and renegotiation. This framework for intercultural negotiations is flexible and pragmatic. Moreover, this concept of reaching agreement is open to mutual understanding, accommodation, and conciliation among the participants when the principles of recognition, continuity, and consent are upheld and the dynamics of culture are kept in sight. These perspectives assist in explaining FPIC processes and understanding why effective participation is vital to accommodate indigenous peoples' claims.

Elements of FPIC

With this framework for self-determination through participation in place, the different elements of FPIC were explored. Since consenting provides a justification for some action that would otherwise infringe upon rights, consent is in need of strong requirements securing its validity. And misapplication or abuse of these elements hampers proper implementation of FPIC processes.[1569] Consent or consultation processes involving indigenous communities are unfortunately vulnerable to manipulation, considering the imbalances in power, capacity, and knowledge that may exist when for instance large multinational companies negotiate arrangements with small, isolated indigenous communities.

FPIC agreements about projects on or near indigenous territories may have profound and lasting effects on indigenous communities, both in social and economic terms. For that reason, it is essential that FPIC processes are genuinely free and informed. The different elements of FPIC were examined from a number

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[1567] Tully, 1995, pp. 10-11. An important insight that helps explaining FPIC processes, and possible problems that may arise in such processes.

[1568] Tully, 1995, pp. 10-11. This old "billiard ball" conception of cultures in the past led to principles like the Wilsonean idea of "one nation, one state." This has proved to be to a certain extent unattainable and undesirable.

[1569] Examples are: misinformation, manufactured consent, misrepresentation, hostile forms of coercion and manipulation in FPIC processes.

of perspectives in order to get to a more detailed understanding of what it means for consent to be provided "free and informed."

Recent studies, workshops, and reports have elaborated on the meaning of the different elements of FPIC to some extent. Free should imply that consent is given without the presence of coercion, manipulation, or intimidation. Prior denotes that indigenous peoples have sufficient time to make a decision before the project commences or the final decision is taken. Informed should imply that indigenous peoples have access to information concerning the nature, scope, duration, and a number of other elements of a certain proposed project. FPIC processes may include the option to say "no" to a certain project but this depends on the nature of the affected rights and the impact of the decision at hand.

With this baseline in mind, the different elements of FPIC were analyzed in more detail, starting with what could be meant by "free" in the context of decisions that affect indigenous peoples' lands and resources.

Free: Discursive Control and Non-Domination

A particularly attractive perspective on what is meant by freedom in FPIC can be found in the work of Philip Pettit because he explained freedom from an *interpersonal* perspective and explains that freedom can be guaranteed when an agent has sufficient *discursive control* in a dialogue or decision-making process. This idea of freedom as enjoyed between different groups or individuals is exactly what indigenous peoples need in FPIC processes.

It is essential that the agent is fit to be held responsible – what Pettit called "effectively reactionworthy" – for a certain action to be seen as free. Intuitively, it is proper to speak of freedom when we can say that a person - or people - is responsible for a certain action or decision.

Discourse-friendly relationships preserve a person's freedom. It is essential for such relationships that the actor involved is recognized as a partner for discourse and also that the actor is authorized to take his place in the decision making process. Pettit called this capacity "discursive control" and if the group involved has sufficient discursive control in a decision making process its freedom is preserved.

Agents in Pettit's view will be free persons to the extent that they have the ratiocinative capacity for discourse and the relational capacity that goes with enjoying discourse-friendly linkages with others.[1570] That capacity, with its dual aspects is what constitutes discursive control. Agents will exercise such freedom as persons so far as they are engaged in discourse with others, being authorized as someone worthy of address, and they will be reinforced in that freedom so far as

[1570] The first - the ratiocinative - concerns the abilities of the agent. In addition to the ability to deliberate free agents must have the ability to discourse. The second - the relational - concerns the social situation of the agent: free agents must be able to enter into actual discourse, and to do this they must have others around them with wom they can have discourse-friendly relations.

they are publicly recognized as having the discursive control it involves.[1571] This translates nicely to the context of indigenous peoples in FPIC and self-determination processes. Both building capacity and a setting in which indigenous peoples are recognized as equal partners in the decision-making process are at the heart of what FPIC processes should be about.

Pettit also illustrated that this concept of discursive control translates to the political area in the form of the principle of non-domination, which is a central theme in documents, discussions, definitions, and measures that deal with the protection of indigenous peoples. If non-domination is upheld, it means that minority groups and indigenous groups are protected from state interference that amounts to arbitrary decision-making. By targeting and condemning only arbitrary interference, the ideal of non-domination could establish a polity that can possess coercive powers, but is constrained to such an extent that these powers tend not to be arbitrary.[1572]

Pettit acknowledged that this requires a new conception of democracy that is hospitable to minority and indigenous contestation rights. In his concept of democracy multicultural nations have to establish special *ex-ante* and *ex-post* contestatory powers for such groups in order to preserve their political freedom and to prevent them from becoming dominated by the majority.[1573] This necessarily includes various self-government and participation rights, like FPIC.

Kymlicka described these rights as mechanisms that protect minorities against the possible injustices of state nation building.[1574] These mechanisms determine and shape forms of self-rule by means of a "multilogue," the inter-cultural dialogue Tully described. Pettit argued that in order to accommodate such minority rights, the concept of electoral democracy needs to be supplemented with what he called a contestatory dimension, in which special contestation rights, like FPIC are guaranteed for minority groups.

"Free" in free prior and informed consent is best described as a large degree of discursive control in the relevant decision-making processes. When indigenous peoples enjoy discursive control, they can be seen as fit to be held responsible for the choices they make. The concept of discursive control does not leave room for hostile coercion, while more friendly forms of coercion, like offers, pleas, and bids, are not ruled out. Politically, the notion of discursive control relates to principle of non-domination, which is a central requirement for realizing indigenous peoples'

1571 Pettit explained that this view of freedom leaves no room for hostile coercion, but it does allow for a number of other coercive actions, like an offer, bid, or plea. Furthermore he argued that his theory also applies to groups andcollective agents (the same way it applies to individuals) as long as they count as social integrates.

1572 Since upholding a principle of non-domination implies that state interference is only allowed when it tracks the interests of the interferee.

1573 These contestatory powers - like FPIC - establish a form of "editorial control" over state decisions and policies.

1574 Instead of perceiving minority rights as a special status or privilege. Kymlicka W, *Politics in the Vernacular, Nationalism, Multiculturalism and Citizenship* (Oxford University Press, 2001), pp. 1-2.

right to self-determination. FPIC entails co-responsible, non-dominated, and discursively controlled decision-making.

Prior: Ex-Ante and Ex-Post Control

The insights gained from Pettit's and Tully's studies also help in qualifying the requirement of "prior." Obviously, this is an important requirements for any genuine FPIC process since there should be ample time allocated for internal debate and decision-making according to an indigenous community's own cultural customs before a project might commence.

Nevertheless, FPIC is not only relevant prior to any agreement between indigenous peoples and others, but it is also concerned with sustaining respectful relations over time. FPIC may include revision of existing arrangement in light of new information or changed circumstances. When large, long-term projects are executed on indigenous territories, co-management and representation may be necessary. FPIC continues to guide the relationship after a project received a "go" from the community and prior denotes that sufficient time for deliberation should be available, also when revisions of existing projects are planned. Especially in cases where large-scale development projects are under way, circumstances may change and unforeseen issues may arise. In these situations indigenous communities may be pressed or forced to comply or agree. Prior consent does not give companies or states a "carte blanche" to do whatever they want after an initial consent agreement has been formalized. It merely waives specific requirements for limited purposes. This last point was also discussed in the paragraphs on information and communication, to which we will turn now.

Informed: Communicative Transactions

In order to be able to give their FPIC to certain projects or arrangements, it is vital that indigenous peoples are adequately informed about the planned activity. Manson and O'Neill's study on informed consent in the field of Bioethics exposed two main helpful insights. They firstly described *the role* of informed consent as a legal standard. Secondly, they illustrated that the requirement "informed" is as much about *communication* as it is about what information is to be provided. Moreover, theur study exposed a number of standards that are essential to conclude successful communicative transactions. Seen together with Tully's model for an intercultural dialogue and Pettit's notion of discursive control, this outlined the dialogical model FPIC processes aim to uphold.

First of all, consenting concerns a *waiver* of other, more fundamental entitlements. Since consenting may – and very often will – have profound effects on indigenous communities, it should be accompanied with strong requirements – free, prior, and informed – that secure its validity. The focus in FPIC processes should be as much on the way in which communication is taking place between indigenous peoples and other actors, as it should be on informational disclosure. Information should be identified as action rather than only as content, since

informed consent processes involve much more than merely the transfer of information.

The *role* of FPIC is that it justifies acts that would otherwise be unacceptable or illegitimate. Any justification of informed consent therefore has to start from recognition of the underlying legal and ethical claims and legitimate expectations that are waived by consent transactions.[1575] This is also the reason why the foundations of FPIC, namely self-determination and rights to lands and resources were treated in detail at the beginning of this study; without an effective land rights regime, FPIC cannot be meaningfully applied. In addition to consent as a defense against a breach of rights, it can also function to create new rights and duties.[1576] Since it is an expression of indigenous self-determination, FPIC also has an important role in generating and sustaining contractual relationships between indigenous peoples, states, and other entities.

A blanket approach to consent requirements that seeks to standardize procedures for consent for all action is neither feasible nor desirable. Consent is a way of ensuring that those subjected to invasive action are not abused, manipulated or undermined, or wronged in comparably serious ways.[1577] It seeks to ensure that such action is done only when specific norms are waived, and it is not undertaken if it would breach important ethical or legal requirements.[1578] Therefore, informed consent requirements have to be flexible and tailor-made. This is as much true for FPIC in the context of indigenous rights as it is in relation to the field of bioethics.

Informed consent processes – seen as communicative transactions – can provide protection against serious wrongs, evidence that violations of rights have not occurred, and assurance that systematic ways of preventing such violations are in place.[1579]Consequently, successful consent transactions can *protect* against serious wrongs, by placing control of invasive interventions that might otherwise cause harm in the hands of those who would be wronged or harmed. When consent is requested, indigenous communities can waive the norms or subjective rights at stake. When such norms are waived, those who consent provide *evidence* that can later be cited to show that no serious wrongs have occurred, and FPIC can be used by those who perform invasive interventions to justify their action. The systematic use of informed consent can furthermore provide *assurance* to third parties that action that would otherwise be seriously wrong is routinely prevented. Conversely, without *free* and *informed* consent requirements, individuals or groups may not be protected against force or fraud, deceit or duress, constraint, or hostile coercion.[1580]

FPIC is not only about "mere choice," but it also entails a "dialogical" process that may also include a number of other considerations and principles that are

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1575 Manson and O'Neill, 2007, p. 73.
1576 Brownsword R and Beyleveld D, Consent in the Law (Oxford, Hart, 2007), Ch. I, p. 7.
1577 Manson and O'Neill, 2007, p. 82.
1578 Manson and O'Neill, 2007, p. 82.
1579 Manson and O'Neill, 2007, p. 96.
1580 Manson and O'Neill, 2007, p. 96.

relevant for its effective application. It was illustrated that a narrow focus on "informing" – as merely transferring types of information – does not take full account what is actually needed for *effective communication* and sustainable commitments between the parties involved.[1581] We have seen that so far, requirements in relation to "informing" in FPIC processes for indigenous peoples also focus mainly on informational disclosure. A more elaborate model of adequate communication is vital for successful communicative transactions in FPIC processes. Companies and states will have to take this into account when "informing" communities about their proposed projects or decisions.

In short, FPIC is primarily about the way in which the dialogue and the communicative process is structured. This insight is crucial for successful informing and for successful FPIC. The key argument is that when informed consent processes are undertaken, it is vital to not only focus on what type of information is to be provided but just as much on how such information is conveyed. In other words, for successful *information* and successful FPIC it is essential that a wide range of norms that guide communicative transactions are taken into account. This is particularly important in the context of indigenous peoples because communicative structures may differ greatly from those of other participants in FPIC processes.

FPIC cannot be achieved by communicative transactions that do not take into account norms of intelligibility and relevance since those norms are essential for effective communication. Moreover, norms of accuracy and honesty must also be respected. In this respect, the principle of good faith has to take a central place in FPIC processes. Other essential features of successful communication include that parties share a language, share at least some background knowledge, and are able to take each other's inferences and commitments into account. This is to be guiding for successful application of the "informed" requirement. Especially in the case of participatory processes involving indigenous peoples, the focus should be as much on how you structure your communication process as on which types and kinds of information is to be provided. This is implicit in the "informed" criterion.

Consent: Representation and Participation

Participation, communication, and dialogue in FPIC processes presuppose forms of representation. International standard setting regarding self-determination is meaningless unless there are intermediate structures that facilitate its implementation, and this is possible only if indigenous peoples are fairly represented.

Both internal and external aspects of representation are vital to take into account for successful FPIC processes. Articles 18 and 19 of the UNDRIP, which set out the general framework for indigenous participation, highlight these aspects. Externally, it is important that it truly is a people "as a whole" that is represented,

[1581] Manson and O'Neill, 2007, p. 184.

while internally the members should be able to participate in the collective will-formation.

Different forms of *isolation* complicate representation and obtaining FPIC. The most isolated communities may be extra vulnerable, and in these communities FPIC processes are usually the most difficult to organize.[1582] At the same time, the social isolation of indigenous groups forms the reason for developing effective participatory mechanisms, like FPIC, considering that they are often marginalized and excluded from decision-making that affects them.

Internally, FPIC processes have to make sure that the voices of *vulnerable groups* within the community - for example women, children, or minorities within minorities - are taken into account, while at the same time it is vital that these internal processes can be conducted in a manner compatible with the cultural governance structures of the group. Appropriate forms of self-government and participation rights may have the effect of promoting democratic values within communities. Indigenous rights are embedded in the international human rights structure and the two will have to go hand in hand.

Since cultures are internally negotiated, interacting, and overlapping and as it is important to take these multiple overlapping spheres of community, authority, and interdependency that exist in societies into account, obtaining consent is a complex issue. However, without taking into account these insights, FPIC becomes impossible to obtain. Perceiving FPIC as a single and centered moment of decision-making is undesirable as this perception may ignore that there are a myriad of intra- and inter-group relations and circumstances that play an important role. Cultural identity is dynamic, and this ought to be reflected in FPIC processes.

These complexities related to *overlap* have the effect that FPIC processes and representation of cultural identities is highly complex, but this should not be seen as a definite obstacle. Acknowledging overlap and devising FPIC structures that take this into account can expose common ground between the parties involved and may lead to real cultural recognition.

FPIC as a Democratic Process

FPIC is embedded in the framework of self-determination and the right to effective participation. In contemporary international law and studies the importance of effective participation and FPIC is highlighted in relation to the implementation of the set standards. An intercultural dialogue is needed in which indigenous peoples enjoy a large degree of discursive control. When they are in a non-dominated position *co-responsible* decision-making will be possible. Fair representation and standards that guarantee successful communicative transactions are essential in any FPIC process. From the application of informed consent in the

[1582] This is not to say that isolated communities are always more vulnerable, but when it comes to large-scale development projects that affect these communities, the power imbalances, cultural differences, and social impacts may often be larger than for instance regarding certain indigenous populations that live in urban areas and are already aquainted with the ways of the majority culture and their economic systems.

field of bioethics it became clear that it is vital to focus on the way in which communication takes place in order to apply the informed requirement. Moreover, check-list or standardized approaches to FPIC are to be avoided. FPIC functions as a waiver for actions that would otherwise infringe upon rights (to self-determination, lands, and resources).

Part III, Procedures, exposed the central principles that need to be taken into account in order to successfully conduct FPIC processes. With this - fairly abstract and ideal - model in place, the platforms for FPIC were examined in Part IV and the relevant legal and voluntary practices surveyed in Part V.

VI.1.3 Platforms: International Diffusion of FPIC Norms

In part IV the different platforms that assert FPIC as an important norm for dealings with indigenous peoples were surveyed. A remarkable number of international and regional organizations have included FPIC requirements in their official policies, guidelines, recommendations, and other documents over the last few years. This recent expansion is indicative of a wider consensus that is emerging on the importance of respecting an FPIC principle for indigenous peoples.

FPIC norms can be found, amongst others, in the context of the International Labour Organisation, the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination, and the Committee on Economic, Social and Cultural Rights. Regionally, FPIC is enshrined in the policy of the European Union and in decisions and documents in the framework of the Inter-American and African Human Rights systems.

At the UN level, three specialized platforms exist. The UN Permanent Forum on Indigenous Issues is a unique platform in which indigenous representatives can discuss their concerns on the international level on equal footing with state representatives. The Expert Mechanism, although still a rather new body, has already provided detailed studies on a number of important and pressing issues, like the right to effective participation. The UN Special Rapporteur, in exercising his broad mandate, has an important role to play in alleviating tensions in conflict situations between indigenous peoples, states, and companies worldwide.

Although most organizations posit similar FPIC requirements, there are some deviations - the World Bank being the most notable - with its operational policy 4.10 calling for "informed consultation" and "broad community support". Moreover, while FPIC is emerging as the key standards for including indigenous peoples in decision-making processes of their concern, not too much guidance exists on how to implement it in specific situations. Within the Inter-American Human Rights system and in a number of voluntary initiatives, cases and guidelines have been decided and developed that aim to clarify how FPIC should be applied in practice. This has been the topic of part V of this study.

VI.1.4 Practices: Legal Status, Case Law, and Guidance on Implementation

Case Law and Current Legal Status

The Inter-American Human Rights bodies offer the most elaborate explanation of what FPIC legally amounts to. Over the past decade the Commission and Court have issued a number of decisions and reports that deal with land rights, natural resource extraction, and participation and consent requirements. The Inter-American Court has a pioneer role in explaining how to implement internationally recognized indigenous rights in practice.[1583]

The Court based its arguments for protecting indigenous communities in the Americas on their rights to self-determination, lands, and resources. More specifically it bases its reasoning on the American Convention's rights to property, juridical personality, judicial protection, and affiliated rights to communal property, consultation, and cultural identity. Moreover, effective participation takes a central place in the Court's system. *Recognition* of indigenous peoples as distinct collectives - as legal subjects - with a juridical capacity of their own is essential for any realistic land rights regime. The Court emphasizes that self-determination goes hand in hand with a continuing, ongoing and respectful relation between indigenous peoples and the state, and when new arrangements are made or old ones altered, consent should be the principle that applies.

The OAS jurisprudence examined in Part V illustrated that effective participation means that consultation and consent are vital in order to secure indigenous peoples' control over their lands and resources, as an important component of their right to self-determination. In this respect, consent functions as a defense against violations of human rights.[1584] In a nutshell, the legal model of the Inter-American Human Rights entities entails the following elements.

Indigenous peoples have a collective property rights over their lands, which are based on the human right to property in light of the special spiritual relation they have with their lands (*Awas Tingni case*). In practice, this means that indigenous territories should be (a) delimited, (b) demarcated, and (c) titled, all in consultation with the communities involved and taking into account their customary systems.

Communal property rights are not absolute and can be restricted in the interest of society if the restriction is (a) previously established by law, (b) necessary, (c) proportionate, and (d) with the aim of achieving a legitimate objective in a democratic society. Additionally, when indigenous property rights are at stake, a proposed limitation may not amount to endangering their physical or cultural survival. Therefore, when considering a limitation, the state must follow three

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1583 García-Sayán D, 'The Inter-American Court and Constitutionalism in Latin America', Texas Law Review, Vol. 89, 2011, note 127. Quoting: Rombouts S J and Contreras-Garduño D, 'Collective Reparations for Indigenous Communities before the Inter-American Court of Human Rights', Merko*urios*, Utrecht Journal of International and European Law, Volume 27/Issue 72, 2010.

1584 This defensive role of a legal concept of informed consent was discussed at length in paragraph III.3.3 on informed consent requirements in the field of bioethics.

requirements developed in the *Saramaka case*: (a) ensure the effective participation of the community concerned, (b) guarantee a reasonable benefit from the proposed project, and (c) perform prior ESIAs. To accomplish these, the state should develop effective mechanisms for consultations.

Consultation with indigenous peoples should always have the purpose of obtaining FPIC and to ensure that such participation is "effective" it should be held in accordance with the requirements of "free, prior and informed."[1585] At a bare minimum this means that consultations are in good faith, commenced at the earliest stages of a planned project, and accurately informed. In this respect the obligation to conduct ESIAs is highly relevant.

Consultation is not a single act but concerns negotiations that require parties' good faith and are held with the objective of achieving mutual agreement. FPIC processes therefore also entail large responsibilities on the part of the indigenous peoples involved. As described in Part III, it is necessary that indigenous peoples enjoy a large degree of discursive control in order to make these communicative transactions effective.

In such *co-responsible* decision making processes, states are always under the obligation to consult with indigenous peoples and to guarantee their effective participation in decision-making regarding any measure that affects their territories.[1586] In the *Sarayaku case*, the Court reasoned that this obligation to consult has become a general principle of international law.[1587] Therefore, FPIC is *always* important when decisions affect indigenous communities. It is therefore not a question of *when* FPIC is relevant, but *how* it should guide the consultation process. The right to - free, prior and informed - consultation is vital for securing rights to cultural identity and communal property, which are exponents of indigenous peoples' right to self-determination.[1588] Consequently, failure to respect the minimum requirements of consultation processes may lead to violations of indigenous peoples' rights to collective property and cultural identity.

FPIC and effective participation are certainly not limited to property rights, but it is within this area that these contestation rights are most important for

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[1585] *Cf.* Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 273.

[1586] Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 273.

[1587] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245., par. 164. Also see: American Society of International Law, *The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku*, ASIL Insights, Vol. 16, Issue 35, November 28 2012.

[1588] IACtHR, Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, primarily paragraph 217.

indigenous peoples.[1589] Any administrative decision that may legally affect indigenous and tribal peoples' rights or interests over their territories should therefore be based on a process of full participation.[1590]

In some cases, obtaining consent may become a *mandatory* requirement. This is the case when indigenous peoples are to be relocated, when hazardous materials are stored on (or in) their territories, and when large scale development or investment projects may have a *significant impact* on them. This last situation may often be present when such projects concern the extraction of natural resources.[1591] The obligation to consult or obtain consent is a responsibility of the state.[1592]

Of vital importance is the insight that FPIC processes concern both consent and consultation requirements. Consultation processes that do not aim to reach agreement are no genuine consultation processes. And consent, more specifically "free, prior and informed" consent, cannot be achieved without a fair consultation process. Distinguishing between consultation and consent processes is therefore highly counterproductive, since the scope of FPIC can only be assessed in and through consultation processes.

In all cases that were discussed the Court stressed that effective participation, communication, and community consent is urgently needed to protect indigenous communities in the Americas.[1593] Contestation rights are seen as proper instruments to accommodate non-dominated decision-making between indigenous peoples and other actors and to neutralize existing power imbalances. They provide a democratic stimulus in multi-national societies. Moreover, this

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[1589] As explained at the beginning of this study, this is the reason why the focus is on indigenous peoples' rights to land and resources. In this area the problems concerning decision-making and consultation and consent provisions are most pressing.

[1590] Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 277.

[1591] Also see: Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 283: "The duty of consultation, consent and participation has special force, regulated in detail by international law, in the realization of development or investment plans or projects or the implementation of extractive concessions in indigenous or tribal territories, whenever such plans, projects or concessions can affect the natural resources found therein."

[1592] IACtHR, Saramaka People v. Suriname, Judgement of November 28, 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 134. Also see: Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System, par. 291: "Carrying out consultation procedures is a responsibility of the State and not of other parties, such as the company seeking the concession or investment contract. […] because corporate actors are, as a matter of definition, profit seeking entities that are therefore not impartial."

[1593] Also outside the Americas, this system is noticed. The Endorois decision of the African Commission on Human and Peoples' Rights is highly influenced by the Inter-American Court's cases.

integrated system of environmental protection and human rights law is aimed at achieving development models that are sustainable and respectful of cultural diversity. The Inter-American system comprises the most comprehensive, detailed, and legally most complete scheme of land, resource and participation rights for indigenous peoples, based on a large number of concrete situations and existing cases.

Guidance on Implementation

The most practical implementation models for FPIC on the project level that are in line with contemporary international law and the explanations given to it within the Inter-American Human Rights system can be found in a number of very recent guidelines and documents in the context of voluntary schemes that deal with sustainable use of natural resources. It is in the framework of these "voluntary initiatives" that the most progressive attempts at implementing FPIC are undertaken. They offer the most tangible guidelines for operationalizing FPIC processes and were therefore closely examined. These specific schemes may go further than what is legally required but they do take current international legal developments as their vantage point.

The *Akwé: Kon Guidelines* integrate social, cultural, and environmental impact assessments. As discussed, the scope of FPIC necessarily depends on the impact the decision will have on the indigenous communities affected. These impact assessments are also required by international law, most prominently in the "Saramaka model" the Inter-American Court developed.[1594] The CBD guidelines certainly assist in fulfilling the "informed" requirement of FPIC. Without proper – and participatory – assessments of the impact a certain project or decision may have on the culture, social structure, and environment of indigenous peoples and other involved actors, making a genuinely informed decision is impossible.

The implementation models that were explored in the framework of the *FSC* and the *UN-REDD Programme* offer the most comprehensive and detailed systems for implementing FPIC currently available. Although both these schemes focus on the implementation of FPIC in relation to specific projects, they do offer general guidance that may be taken into account in a variety of FPIC processes.[1595] Both schemes acknowledge this and the respective guidelines are based on international law and the Inter-American model.

These three examined schemes all focus on a participatory, community developed FPIC protocols, and focus as much on the way communication should

[1594] Also see UNDRIP, Article 32(3) on development projects that affect indigenous peoples lands: "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."

[1595] It was already suggested that the FSC and UN-REDD Programme guidelines may serve to inform the other sustainability initiatives explored in this paragraph: the 'Roundtables' and the ICMM.

take place as on which type of information is to be provided.[1596] This way, a self-determination based process is promoted. Although it was stressed that FPIC processes have to be flexible, tailor-made, and structured by and in line with indigenous customary laws, there are of course some guidelines that may be followed on the project level that actually promote flexible, culturally sensitive processes.

These are primarily: (a) identification of the indigenous communities and stakeholders that may be affected; (b) identification of the rights at stake and the representative institutions; (c) participatory mapping of the lands and resources involved; (d) participatory social, cultural and environmental impact assessments; (e) community developed FPIC protocols; (e) awareness raising, capacity building, and allowing for sufficient time and resources for internal and external deliberation on the proposed projects; (f) producing consent agreements; (g) creating effective review and grievance mechanisms. All these steps ought to conform to contemporary international law, mainly the provisions from ILO Convention No. 169, UNDRIP and the CBD.

Certainly, these guiding steps are by no means meant to be exhaustive but they do provide general and flexible principles to be taken into account in a variety of situations where FPIC processes are to be conducted. Moreover, each step is conducive to creating a situation of discursive control for the communities involved.

Apart from these three most recent and relevant initiatives, other initiatives were examined (RSPO, RSB, RTRS, and ICMM). These all enshrine FPIC as an important criterion for sustainable commodity use. Nevertheless, guidance on the implementation of these requirements is underdeveloped and needs further study.

Although there are not a lot of case studies available as of yet, different best practice and case studies are being developed, which will undoubtedly lead to useful insights. Voluntary initiatives may go beyond what is strictly speaking legally required, but they also adhere to the international legal standard-setting on FPIC.[1597] The proposed implementation models focus on continuous dialogue with indigenous communities and entail strong information and communication requirements before and after formalizing an FPIC agreement about projects dealing with sustainable commodity use.

Practical implementation remains very difficult, as the *Orang Asli case* illustrated. It showed a number of complications that may arise when implementing FPIC requirements. These mainly had to do with non-recognition of indigenous rights in national law, overlapping rights and claims to lands and resources, misuse of consultation processes and representation issues.

It is in the area of sustainable commodity use that the dynamics surrounding FPIC are most visible. More and more initiatives include consent protocols, and

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[1596] *Cf.* Paragraph III.3.3 where the informed requirement was clarified with reference to the field of bioethics.

[1597] Which is often more than can be said of national legislation in this respect.

further data and guidance on implementation of FPIC becomes available each day. This will undoubtedly lead to a better understanding on how to operationalize FPIC processes effectively and realistically. FPIC norms and processes are rapidly developing and spreading and these will become ever more pervasive and common in the near future.

In Short

The themes discussed in this study reflect conditions under which successful implementation of FPIC processes could be possible. Recognition of self-determination or self-government rights may require derivative rights to lands and resources, and participatory mechanisms to facilitate their implementation.

A political association – a multi-nation state – may accommodate such rights when it is guided by a principle of non-domination, and organizes a democratic intercultural dialogue between the different cultural groups based on recognition, continuity, and consent. Such effective participation is essential for indigenous peoples to have a fair say in decisions that affect them and requires tailor-made consultation processes in good faith.

FPIC qualifies how such consultation processes could be organized. If indigenous peoples enjoy a large degree of discursive control in these processes, they can be seen as fit to be held responsible and consequently as "free" in relation to others. FPIC processes require both ex-ante or prior powers of contestation and ex-post mechanisms for revision and review. Within these consultation processes, it is vital to uphold certain standards for successful communicative transactions next to providing the necessary information for making an informed decision. These safeguards – free, prior and informed – are needed since providing consent may have profound economic, social, and cultural consequences and because it involves a (partial and specific) waiver of the substantive rights involved.

A legal framework in which these FPIC requirements could be implemented may require recognition through demarcation, delimitation, and titling of indigenous peoples lands. Subsequent property rights are not absolute but may be limited. Such restrictions are allowed if they are established by law and if they are necessary, proportional, and serve a legitimate purpose. Additionally, when certain projects affect indigenous peoples' lands and resources, they may only proceed when prior impact assessments have been conducted, if fair arrangement on benefit-sharing or compensation are in place, and if this all happens with the effective participation of the communities involved.

Where the goal of such obligatory consultation processes should always be to obtain the free, prior and informed consent of the communities involved, in some cases obtaining FPIC may gain a more mandatory character. This appears to be the case when indigenous peoples are (a) relocated, (b) when hazardous materials are disposed or stored on their lands or territories, and (c) when large-scale development or investment projects have a significant or major impact within indigenous territories. The scope of FPIC is necessarily dependent upon the impact of the proposed decision and the nature of the rights involved.

A number of voluntary initiatives contain guidance on how to implement FPIC processes on the project level. Important steps to take in this respect are: (a) identification and recognition of the indigenous communities involved and their rights, lands, and resources, (b) participatory mapping and social, cultural, and environmental impact assessments, (c) awareness raising and capacity building, (d) community developed FPIC protocols, and (e) arrangements for effective review and grievance mechanisms. The specific initiatives that were examined may go further than what is legally required, however, they are based on the contemporary international legal framework.

Given the interpretation of FPIC provided in this study, these are the conditions under which its implementation can become successful.

VI.2 FPIC: Limitations and Future Development

FPIC is a relatively new and very dynamic concept that is in rapid development. Therefore this study tracked the evolution of participation rights for indigenous peoples. In this respect, the relevant laws, norms, and practices are in a dynamic phase of definition.[1598] Moreover, while most of the international standard setting has been done, we are still far removed from effective implementation of the rights and principles enshrined in the UNDRIP.[1599] The aim was not to provide a comprehensive study on FPIC but to determine its current status, analyze its development, suggest justifications – why FPIC is so important – and routes towards implementation. Hopefully this work will serve as a catalyst for further discussion and debate.

FPIC is gaining ground as one of the most important tools to protect indigenous peoples and their livelihoods. A growing number of companies and states recognize the importance of gaining a social license to operate by obtaining indigenous peoples' consent. But as is often the case with legal concepts in development – especially in international human rights law – it takes a while to bridge the gap between standard-setting and genuine implementation. Some tentative remarks on the questions that still need to be answered and the possible drawbacks of FPIC processes follow. Subsequently, some suggestions for the future development of FPIC will be presented.

Limitations

FPIC was examined mainly in the context of decision making processes that affect indigenous peoples' lands and resources, since this is the area in which inclusion of

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[1598] Colchester M, 'Free, Prior and Informed Consent: Making FPIC work for forests and peoples', The Forest Dialogue, 2010. Also see: Colchester M and Cariño J, 'From Dams to Development Justice, Progress with 'Free, Prior and Informed Consent' since the World Commission on Dams', Water Alternatives, Volume: 3, Issue: 2, 2010, Pages: 423-437.

[1599] Full effective implementation will probably remain an ideal situation. *Cf.* Douzinas C, *The end of human rights: Critical legal thought at the turn of the century* (Hart Publishing, 2000).

indigenous peoples is most needed, and where the economic, social, and cultural impact may be the highest.[1600]

Although the goal of FPIC is to bring about sustainable agreements between indigenous peoples, states, and companies, it is not unthinkable that in some situations misinterpretations of FPIC may have a polarizing effect on their relationship, may paralyze decision-making, and may escalate external conflicts over lands and resources. This is why the Special Rapporteur has mentioned time and again that perceiving FPIC as a veto power for indigenous communities is not the right way to proceed. A better perspective is to see FPIC as a duty to reach an agreement in good faith and in line with the cultural and traditional governance structures of the communities involved. Moreover, FPIC may also lead to internal division, since it may require communities to embrace a uniform position. This may escalate debates between different groups within the community – e.g. elders and young people – or different communities who may have conflicting land claims or other interests.

An obvious drawback of the FPIC system discussed is that it will undoubtedly require a lot of time and resources to conduct the necessary consultation processes, impact assessment, and mapping operations. States and companies will have to invest a lot in projects for land titling and delimitation, grievance procedures, consultation rounds and capacity building. Another, maybe less obvious drawback, is that FPIC may also place a lot of responsibility and put a lot of pressure on the communities involved. Although FPIC requires consultations in line with the cultural or traditional decision-making methods of the indigenous communities, it certainly also involves interference by large, dominant actors like companies and states. This may very well lead to social problems, stress, and uncertainty. This is why it is so important not to create a "single formula" implementation model for FPIC processes and to avoid a "check-list" approach.[1601] Projects on the community level have to be approached on a case by case basis.

Furthermore, although FPIC is meant to help indigenous peoples to exercise their right to self-determination, it is essentially a reactionary concept. Indigenous peoples are asked to agree or disagree with an agenda that is set by someone else. This way it may be difficult to see FPIC as a tool to promote self-determined development. For instance, it does not seem to require that states aid indigenous peoples in development projects devised by themselves. This is of course an important aspect of the right to self-determination, especially its economic component, and application of FPIC as a pro-active principle is as of yet underexposed.

In reality, many of these processes strike a balance between effective decision-making and development goals on the one hand and fair inclusion of culturally distinct groups in the decision-making on the other, and this balance may not be

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[1600] FPIC is also important in relation to intellectual property rights, for instance when indigenous art is being sold or exhibited and where traditional knowledge is used by others.
[1601] See especially paragraph III.2.4 and III.3.3.

in favor of the indigenous communities concerned. While all these reflections on the ideal model of FPIC may sound nice, we should not forget that in reality effective participation is often is absent and indigenous communities may be ignored, manipulated, or removed from their lands while other powerful other players benefit from the precious resources located on indigenous territories. FPIC may very well be the last line of defense – besides violent conflict – these communities have to protect their livelihoods.

Future Development

Over the coming years, efforts will have to be directed towards examining FPIC projects in a variety of contexts and collecting information on the benefits and drawbacks of particular approaches. Essential in this respect is that the experiences of the indigenous communities involved are carefully mapped. Certainly, it is also important to learn from the experiences of the other actors involved, like companies, state institutions, NGO's, other organizations, and affected communities or individuals.

Firstly, comparative research and case studies are needed. Both the Forest Stewardship Council and the UN REDD Programme are planning and conducting FPIC pilot projects to collect data on how to implement FPIC processes in their respective fields. This is certainly to be encouraged and it is to be hoped that more of these pilots will take place in other contexts, for instance in relation to World Bank projects and the IFC, regional development banks, and of course at the national level. If the different organizations exchange data and try to coordinate their approach, it will form a great opportunity for collecting valuable data on how to make FPIC work. "FPIC teams" of experts and community members could help and document the processes so that multidisciplinary teams of experts can analyze and produce further guidance on effective implementation. Both top-down and bottom-up models for implementation are needed since FPIC is both a global human rights norm and a duty to listen to the needs and ways of specific communities. To really test the principles that were subject of this study we need detailed and numerous case studies that can be brought in a comparative perspective; an intercultural and international dialogue between all parties involved. The UNPFII, Expert Mechanism, and Special Rapporteur could play an important role in this respect.

Secondly, the focus should be on awareness raising and capacity building in communities. Indigenous peoples are often not aware of their rights and this makes them vulnerable to abuse by companies or state representatives that have different interests from those of the community. Furthermore, since FPIC processes are complex, time-consuming, and necessarily include interaction with players – often very powerful ones like TNC's or other organizations – training and other forms of capacity building are needed. There may be an important role for civil society organizations in this respect. However, it is not just indigenous communities that may require more capacity and knowledge about FPIC; companies and governmental organizations also need training, information, and capacity to be properly outfitted to conduct consultation processes.

Thirdly, more research is needed on how to combine environmental protection and respect for indigenous rights. While it is stressed in all examined documents, cases, and implementation schemes that environmental protection and indigenous peoples' rights should go hand in hand, it is not inconceivable that in some cases environmental and indigenous peoples' interests may collide. For example, what is to be done when environmental impact assessments clearly indicate substantial environmental damage while communities and companies still plan to proceed with a certain project? Well-balanced sustainability models are needed.

Fourthly, more clarity and guidance on the role of companies in FPIC processes is required. Human rights law is primarily concerned with obligations of states, but in situations where FPIC comes into play, companies play an important and often powerful role. In this framework it will be interesting to monitor implementation of for instance the IFC's new performance standard on indigenous peoples and the application of the "Ruggie Principles."[1602]

A number of positive initiatives are already under way. Some examples (apart from the mentioned FPIC pilots in the framework of the FSC and UN REDD Programme) are that Cultural Survival hosts a series of radio broadcasts – in different languages – to promote awareness about FPIC. Moreover, they developed an interactive map of the world on which you can mark FPIC projects and monitor them. Furthermore, communities use GPS and social media for mapping territories and indicating possible conflict areas. Such creative initiatives are to be encouraged and modern technologies may certainly be of assistance.

FPIC processes are here to stay and will continue to play a larger role in the future. Widespread diffusion and application of FPIC requirements and further integration in environmental protection initiatives may lead to self-determination models that promote sustainable development and are respectful of cultural differences. Successful FPIC processes could lead to a social and environmental license to operate by which all parties involved – certainly also companies and states – may benefit in the long term.

[1602] A/HRC/17/31, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011. Also see: A/HRC/24/41, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples, 1 July 2013. For the relation between FPIC and (extractive industry) companies.

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